BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals was rendered March 2, 1942 (Tr. 519). Rehearing was denied April 6, 1942 (Tr. 555). The case is reported as *Miller, et al.* v. *Advance Transp. Co.,* No. 7744, in 126 Fed. (2d) 442. The opinion is set out in an appendix to this brief.

Jurisdiction.

This Court has jurisdiction to review the decision of the Circuit Court of Appeals under Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347). Federal jurisdiction was originally invoked on the ground of diversity of citizenship, the amount of damages claimed being in excess of $3,000.00.

The grounds for invoking the jurisdiction of this Court are outlined in the petition for writ of certiorari and are briefly as follows:

1. The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof.

2. The Circuit Court of Appeals failed to follow the law of Illinois and the law as laid down in its opinion is in conflict with the decisions of the Illinois courts.

3. That under the law of Illinois and the proof adduced on the trial the plaintiffs are not entitled to recover.

Statement of the Case.

The respondents, herein referred to as plaintiffs, seek to recover damages for personal injuries sustained when

an automobile in which they were riding collided with the rear end of a tractor and trailer truck belonging to the petitioner, herein referred to as defendant. The case was tried before a court and jury, verdicts were returned for the plaintiffs and judgments were entered by the trial court on the verdicts. Motions were made by the defendant for directed verdicts and for findings as to each of the charges laid in the complaints, both at the close of the plaintiffs' case and at the close of all of the evidence, which were overruled by the trial court. A motion for judgments notwithstanding the verdicts was interposed and was also overruled by the trial court. The Circuit Court of Appeals has affirmed the judgments of the trial court.

The occurrence in question took place shortly after 10:00 o'clock on the evening of April 4, 1939, on Skokie Highway, also known as U. S. Route 41, at a point thereon north of Tower Road and to the east of the water tower (Tr. 71, 81, 103, 150, 126, 221-223), and within the corporate limits of the Village of Glencoe, Illinois (Tr. 307-309). Skokie Highway is a paved 4-lane highway, 40 feet or more in width, straight and level, and runs in a general northerly and southerly direction. Traveling from the south it angles somewhat to the west (Tr. 309).

The plaintiffs' evidence tends to prove the following facts:

A short time prior to the occurrence complained of, Zeno Tokarczyk, the driver of a truck belonging to the Bartzen Transportation Company, while proceeding in a southerly direction upon Skokie Highway, drove his truck off the pavement and onto the west shoulder of the highway and stopped at a point thereon directly east of the water tower (Tr. 71) for the purpose of flagging down another Bartzen truck pulling out from Chi-

cago and to get a key for the Racine terminal (Tr. 71). After obtaining the key the northbound truck went on and the driver returned to his own truck, where he found that the wheels had sunk down into the shoulder to such an extent that he was unable to get it back onto the pavement. Thereupon his helper flagged down a Checker Express truck which pulled up a little ahead of the Bartzen truck and stopped. The driver of the Checker truck got a chain from his truck with which they were making preparations to pull the Bartzen truck back onto the pavement. In the meantime a third truck, belonging to the Trans-American Line, arrived from the north and stopped a short distance to the south of the Checker truck (Tr. 73). A fourth truck arrived from the north, a Gateway, which stopped a short distance to the south of the Trans-American truck (Tr. 76). Each of these trucks had six wheels and was of the tractor and semi-trailer type. They were about 35 feet in length and stopped at least 15 feet apart (Tr. 81). The drivers of these trucks had lighted some fusees which were strung along the west side of the road. How many, the evidence does not definitely disclose, but there were perhaps six or eight (Tr. 97). There were also, perhaps, a few kerosene pot torches set along the west side of the pavement.

When the Checker truck attempted to pull the Bartzen truck back onto the pavement, the chain, by which it had been attached, broke. Thereupon the Trans-American driver got a cable out of his tool chest and brought it back for the drivers of these trucks to use (Tr. 73). At about this time three trucks belonging to the defendant arrived from the south and came to a stop on the pavement in the east traffic lane (Tr. 73). When they came to a stop the rear end of the defendant's truck which was furthest to the south, according to the plaintiffs' proof, was 30 to 40 feet to the north

of the rear end of the Bartzen truck (Tr. 86). The lights were burning on the rear of the defendant's trucks (Tr. 80, 88).

The plaintiffs were engineers employed by the Johns-Manville Corporation at Waukegan, Illinois (Tr. 134, 154, 179, 199, 243). They had driven in from Waukegan to the Y.M.C.A. in Chicago that evening to attend a lecture and, at the time of the occurrence, were on their way home. The car, a Lincoln Zephyr, was owned and driven by the plaintiff Miller. The plaintiff Foster was seated in the front seat with Miller, and the other three in the back, Shoffner on the right, Wagner in the center and Browne on the left (Tr. 135, 155, 180, 201, 246). They were traveling north.

According to their testimony, they approached the place of the occurrence in question at a speed of 40 to 45 miles per hour (Tr. 135, 166, 202, 246, 247). The car was being driven with the town or dim lights (Tr. 225, 228, 273, 274). They were unable to estimate how far forward these lights made objects on the road visible (Tr. 274, 225, 228). Miller testified that he did not change the lights as he approached the place of the occurrence (Tr. 275). The plaintiff Foster testified that when they arrived in the vicinity of the trucks the speed was decreased to between 30 and 33 miles an hour (Tr. 232) but the plaintiff Miller, the driver, testified he could not tell how much he decelerated the speed (Tr. 274). The plaintiff Wagner testified he first saw the truck when it was 40 to 50 feet away (Tr. 137, 148, 181). The plaintiff Foster saw it when it was 65 to 75 feet ahead (Tr. 207). The other plaintiffs apparently did not see it until just before the impact. The brakes, however, were applied, there was a screeching of brakes or tires that lasted for some time (Tr. 80), the car proceeded straight ahead (Tr. 150, 175), and collided head-

on with the center of the rear of the defendant's truck. Skid marks left by the car measured 75 feet to the rear (Tr. 124). The speed of the car at the time of the impact was variously estimated at 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 169), and 12 to 20 miles per hour (Tr. 234).

The weather was clear and the pavement was dry (Tr. 92, 104, 225, 248). There was no traffic or obstruction in the traffic lane to the west of the defendant's truck (Tr. 149, 150). The plaintiff Foster testified that as they were passing the trucks on the west side of the road he saw a flashlight flashing from left to right about 60 to 65 feet ahead of them on the road (Tr. 205, 236, 237), and that he told Miller that there must be something wrong (Tr. 237).

The plaintiffs testified that the fumes and smoke from the fusees gave the atmosphere a reddish glow which a slight wind carried to the east side of the road and which obscured their view (Tr. 136, 147-148, 157, 175, 181, 203, 233, 247, 248, 273, 275). The plaintiffs were in disagreement as to how much it obscured their view, but the plaintiff Miller, who was driving the car, testified that it obscured his vision to such an extent that his lights did not illuminate the highway at all and that he would not say that he could see as much as 10 feet ahead (Tr. 274). He also testified that he had no idea of the speed at which he traveled through it; that it covered an area of 50, 60, or 70 feet; that he did not change his lights when he got into the smoke; and that he had no idea what distance would be required, at the speed he was driving, for him to stop (Tr. 274, 277).

While the questions raised on the appeal are questions of law and not of fact, and the defendant's evidence on conflicting questions of fact may be disregarded, the defendant's proof emphasized certain of the

material facts proven by the plaintiffs themselves. Witnesses for the defendant, most of them disinterested, testified that the lights were burning on the rear of the defendant's truck before and at the time of the occurrence (Tr. 338, 339, 359, 389, 399, 406, 430, 444). Witnesses for the defendant also testified concerning the skid marks left by the car in which the plaintiffs were riding, but to the effect that the car in which the plaintiffs were riding skidded not 75 feet, as their proof showed, but a distance of 200 feet (Tr. 339, 388, 389, 408, 445). A disinterested witness for the defendant testified that the car in which the plaintiffs were riding approached the scene of the accident at a speed of from 70 to 80 miles per hour (Tr. 360) and that as it passed the line of trucks on the west side of the highway it was still traveling from 60 to 70 miles per hour (Tr. 368). The plaintiffs produced no evidence outside their own testimony that the smoke or smudge emitted by the fusees or kerosene torches was sufficient to interfere with their vision. Other witnesses, most of them disinterested, testified to the effect that the smoke or smudge, if any, emitted was negligible and did not interfere with visibility at all (Tr. 339, 361, 401, 425, 431, 440, 441).

Specification of Errors.

1. The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

2. The Circuit Court of Appeals has misconstrued the statutes of Illinois relied upon by the plaintiffs; has misinterpreted the law as laid down in the decisions of the Illinois courts; and the law as laid down in its opinion is in conflict with the holdings of the Illinois courts.

3. The court erred in holding that the plaintiffs sustained the burden of producing sufficient proof of the exercise of ordinary care on their own parts to entitle them to have their cases submitted to the jury.

4. The court erred in refusing to hold that the plaintiffs were guilty of contributory negligence as a matter of law.

5. The court erred in refusing to find, as a matter of law, from the record that the proximate cause of the occurrence complained of was the negligence of the plaintiff Miller, and not any negligence on the part of the defendant.

6. The court erred in holding that there was sufficient evidence of negligence on the part of the defendant to make the question of the defendant's negligence one of fact.

7. The court erred in refusing to find, as a matter of law, that the defendant was not guilty of any negligence which was a proximate cause of the plaintiffs' injuries.

8. The court erred in refusing to find, as a matter of law, that the stopping of the defendant's truck on the highway merely created a condition that made the occurrence in question possible and that such stopping was not the proximate cause of the occurrence.

9. The court erred in holding that there was no variance between the plaintiffs' proof and the material allegations of their complaints.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

(See Argument.)

II.

The Circuit Court of Appeals failed to follow the law of Illinois governing the burden of proof.

1. The occurrence complained of took place in Illinois. The plaintiffs' causes of action, if any, are governed by the law of that state. Under these circumstances it was the duty of both the District Court and the Circuit Court of Appeals to follow the law of Illinois in arriving at their decisions.

Erie R. Co. v. *Tompkins,* 304 U. S. 64 at 80.

West v. *American Telephone & Telegraph Co.,* 311 U. S. 223 at 236-237.

Fidelity Trust Co. v. *Field,* 311 U. S. 169 at 177.

2. The law of Illinois is well settled that, in an action of this kind, the burden is on the plaintiff to prove freedom from contributory negligence on his own part, negligence on the part of the defendant, and that the negligence, if any, of the defendant was the proximate cause of his injuries.

Dee, Admr. v. *City of Peru,* 343 Ill. 36 at 41.

Wilson v. *I. C. C. R. R. Co.,* 210 Ill. 603 at 606.

Munsen v. *Illinois Northern Utilities Co.,* 258 Ill. App. 438 at 444.

3. It is also well-settled law in Illinois that a plaintiff must produce positive, affirmative proof of actionable negligence and that damages cannot be assessed on surmise or conjecture.

Rittler v. *Industrial Com.,* 351 Ill. 338 at 353.

Deming v. *Hallberg,* 221 Ill. App. 180 at 183.

McCormick H. M. Co. v. *Gabris,* 130 Ill. App. 624 at 631.

III.

The evidence is insufficient to support the verdicts.

1. The plaintiffs were guilty of negligence, as a matter of law, which contributed to cause their injuries.

Cooney v. *F. Landon Cartage Co.,* 308 Ill. App. 444 at 451; Pet'n for lv. to app. denied by Supreme Court, 308 Ill. App. xv.

Hogrefe v. *Johnson,* 271 Ill. App. 469 at 474.

Johnson v. *Kushler,* 269 Ill. App. 533 at 561.

James v. *Motor Transit Management Co.,* 260 Ill. App. 246 at 256-257.

Collins v. *McMullin,* 225 Ill. App. 430 at 432-433.

Boylon v. *Reliable Cartage Co.,* 258 Mich. 5 at 9, 242 N. W. 231.

Levine v. *Bishop,* 292 Mass. 277 at 279, 198 N. E. 146.

Billingsley v. *McCormick Transfer Co.,* 58 N. D. 913 at 920; 228 N. W. 424.

2. If the plaintiffs were unable to see clearly ahead, it was negligence on their part to drive with the dim lights only, particularly when the bright lights were available.

Scruggs v. *Baltimore & O. R. Co.,* 287 Ill. App. 310 at 315.

Johnson v. *Kushler,* 269 Ill. App. 553 at 561.

Johandes v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328 at 331-332.

Sugru v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99 at 103.

3. If the "smoke," "fumes," "fog" or "smudge" from the flares did, in fact, obscure the vision of the plaintiffs, they were negligent in failing to slow down to such speed as would enable them to stop within the range of their vision.

Johandes v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328 at 331-332.

Hazel v. *Hoopeston-Danville Motor Bus Co.,* 229 Ill. App. 125 at 132; aff. 310 Ill. 38.

Ill. Cent. R. R. Co. v. *Oswald,* 338 Ill. 270 at 275.

Dominick v. *Haynes Bros.,* 13 La. App. 434 at 435; 127 So. 31.

Bong v. *Webster,* 217 Ky. 781 at 786; 290 S. W. 662.

4. Where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it.

Dee v. *City of Peru,* 343 Ill. 36 at 42.

Willgeroth v. *Maddox,* 281 Ill. App. 480 at 485; 286 Ill. App. 622.

Opp v. *Pryor,* 294 Ill. 538 at 547.

Pienta v. *Chicago City Ry. Co.,* 284 Ill. 246 at 259.

5. The fact that the truck was standing on the highway was merely a condition by which the injury was made possible and not the proximate cause of the injury.

Briske v. *Village of Burnham,* 308 Ill. App. 531 at 536.

Geisen v. *Luce,* 185 Minn. 479 at 484; 242 N. W. 8.

Coleman v. *C. B. & Q. R. Co.,* 287 Ill. App. 483 at 490.

Jaggers v. *Southeastern Greyhound Lines,* 34 F. Supp. 667 at 669-670.

Gilbert v. *Goralnik,* 238 Ill. App. 199 at 203-204.

Munsen v. *Ill. Northern Utilities Co.,* 258 Ill. App. 438 at 443.

James v. *Motor Transit Management Co.,* 260 Ill. App. 246 at 257.

Gilman v. *Central Vermont Railway,* 93 Vt. 340 at 343; 107 Atl. 122.

Probert v. *Chicago I. & L. Ry. Co.,* 93 Fed. (2d) 259 at 261.

Orton v. *Penn. R. Co.,* 7 Fed. (2d) 36 at 38.

6. The proximate cause of the occurrence complained of was the negligence of the driver of the car in which the plaintiffs were riding and the plaintiffs are not entitled to recover.

Roanoke R. & Elec. Co. v. *Whitner,* 173 Va. 253 at 260; 3 S. E. (2d) 169.

Jaggers v. *Southeastern Greyhound Lines,* 34 F. Supp. 667 at 669.

Geisen v. *Luce,* 185 Minn. 479 at 484; 243 N. W. 8.

IV.

The plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints.

1. As to the charges laid in sub-paragraph 9 (a).

See Argument.

2. As to the charges laid in sub-paragraph 9 (b).

Miller v. *Erickson, et al.,* 76 Fed. (2d) 598 at 599.

3. As to the charges laid in sub-paragraph 9 (c).

Uniform Act Regulating Traffic on Highways, Sec. 104.

Ill. Rev. Stat., 1941, Chap. 95½, par. 201.

4. As to the charges laid in sub-paragraph 9 (d).

Uniform Act Regulating Traffic on Highways, Sec. 103, Ill. Rev. Stat., 1941, Chap. 95½, par. 200.

5. As to the charges laid in sub-paragraph 9 (e).

Miller v. *Erickson, et al.,* 76 Fed. (2d) 598 at 599.

6. As to the charges laid in sub-paragraphs 9 (f) and 9 (g).

Uniform Act Regulating Traffic on Highways, Sec. 88, Ill. Rev. Stat., 1941, Chap. 95½, par. 185.

7. As to the charges laid in sub-paragraph 9 (h).

Uniform Act Regulating Traffic on Highways, Sec. 121, Ill. Rev. Stat., 1941, Chap. 95½, par. 218.

V.

The Circuit Court of Appeals was in error in holding that there was no variance between the allegations of the plaintiffs' complaints and their proof.

Brodsky v. *Frank,* 342 Ill. 110 at 116.

Buckley v. *Mandel Bros.,* 333 Ill. 368 at 373-374.

Feder v. *Midland Casualty Co.,* 316 Ill. 552 at 559.

Civil Practice Act, Illinois, Sec. 46 (3).

Ill. Rev. Stat., 1941, Chap. 110, par. 170.

Rules of Civil Procedure for the District Courts, Rule 15.

ARGUMENT.

I.

The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

It is true, of course, that where a court is called upon to determine as a matter of law whether a plaintiff's evidence is sufficient to sustain a verdict in his favor, the court cannot weigh the evidence on a disputed question of fact, but may and, as a general rule, should, consider only the plaintiff's evidence, together with the legitimate inferences to be drawn therefrom, concerning such fact, and reject such evidence of the defendant as may be in conflict therewith. It was, therefore, proper, in the case at bar that the Circuit Court of Appeals should view the plaintiffs' evidence in the light most favorable to them. It is, however, respectfully submitted that in its consideration of the evidence the court overlooked or misapprehended many of the controlling facts adduced by the plaintiffs' proof and that the facts as stated in its opinion do not disclose the true purport of their evidence.

In the sixth paragraph of its opinion the court say:

> "Reid, the driver of the truck with which the plaintiffs' car collided, after stopping, went to the west side of the highway to help protect southbound traffic."

Near the end of the thirteenth paragraph of the opinion the court assume that Reid was "protecting southbound traffic." Whether or not Reid, after stopping,

went to the west side of the highway was a disputed question of fact and the court was justified in assuming as true the plaintiffs' evidence on this question. But there is no proof in the record, nor any evidence from which it could be inferred, that the purpose of his going, if he did go, was "to protect southbound traffic." The proof is that there was no southbound traffic to protect. While the question of whether Reid went to the west side of the highway and the purpose of his going are probably immaterial, it becomes important here only for the reason that in arriving at its decision the court has labored under the misapprehension that under the circumstances in evidence there was a duty on the part of the defendant "to protect" oncoming traffic, although no such duty was even alleged in the plaintiffs' complaints.

In the seventh paragraph of its opinion, after stating that the plaintiffs, at a point about 300 to 500 feet south of the point of the collision, noticed the red lights, etc., the court say:

> "and that after discovering the situation, the speed of the car was reduced to about 10 miles per hour."

A similar statement is made in the sixteenth paragraph of the opinion where the court say: "The speed of the car was reduced to some 10 or 12 miles an hour." It is respectfully submitted that there is no testimony in the record on which either of these statements could be based. The testimony of the plaintiffs is quite clear that such was not the fact. The plaintiff Foster testified that when they arrived in the vicinity of the truck the speed was decreased to between 30 and 33 miles an hour (Tr. 232). Their proof shows that the car in which they were riding skidded a distance of 75 feet before it was stopped by coming into collision with the defendant's truck (Tr. 124). The plaintiff Wagner testi-

fied that the car was still traveling at about 25 miles an hour at the time of the impact (Tr. 144, 149). The plaintiff Shoffner testified that at the time of the impact it was still traveling 15 to 18 miles per hour (Tr. 168-169). Plaintiff Foster testified that at the time of the impact the car was traveling between 12 and 15 miles per hour (Tr. 207), and on cross-examination that it was traveling somewhere between 12 and 20 miles per hour (Tr. 235). The only evidence produced by the plaintiffs as to the speed at which the car was traveling at any time was their own testimony, and that is in wide disagreement with the statement made by the court. It will also be noted that the court has not in its opinion considered the plaintiffs' proof that the car in which they were riding skidded a distance of 75 feet, nor the speed at which it was traveling at the time of the impact.

Had the court not overlooked this important part of the plaintiffs' proof its decision would, no doubt, have been different. The fact that the car skidded a distance of 75 feet on a dry pavement and was still traveling at a speed estimated to be as high as 25 miles an hour, or even their lower estimates, shows clearly that it did not approach the scene of the occurrence at a reasonable rate of speed. The fact that it skidded this distance indicates strongly that the driver must have seen the defendant's truck when he was at least that distance from it and that he had ample opportunity to turn into the inner lane to pass it if the speed at which he was driving had not been excessive. The plaintiffs' proof in this respect, we submit, refutes any contention that the driver of the car in which they were riding was in the exercise of ordinary care.

A little further on in the seventh paragraph of its opinion the court say:

> "The atmosphere was variously described as murky or reddish from the reflection of the fusees, as sort of an Indian Summer haze, or a slight smoke or fog."

It is respectfully submitted that the court has overlooked the material testimony of the plaintiffs with regard to this supposed smoke or fog. The only evidence the plaintiffs produced concerning it was their own testimony. The plaintiff Miller, who was driving the car, testified that the supposed smoke or fog obscured his vision to such an extent that he would not say that he could see as much as 10 feet ahead of the car (Tr. 274). The plaintiff Foster, who was sitting in the front seat, on cross-examination, testified to the effect that it was practically impossible to see through the smoke (Tr. 232).

While it seems quite improbable that a few fusees and kerosene torches could emit such a volume of smoke or fog, and while it may be that the court did not believe their testimony, if it was considered, nevertheless, so far as these plaintiffs are concerned, their testimony must be taken as a true statement of the condition as it appeared to them at the time they proceeded to drive through it. It could hardly be said that it was the exercise of ordinary care on their part to proceed without taking precautions commensurate with the conditions as they appeared to them.

A little further on in the seventh paragraph of the opinion the court quotes from the testimony of the plaintiff Foster. This is taken from his testimony as it appears on page 205 of the Transcript. It is respectfully submitted, however, that the plaintiff Foster contradicted himself on almost every essential fact to which he testified. It will be noted from this quoted part of his testimony that the plaintiffs had passed

the truck which was in the ditch when he turned his vision forward and saw this "indistinct light." In the sixth paragraph of its opinion the court state that the rear end of the defendant's truck was 30 or 40 feet north of the rear end of the Bartzen truck, the one in the ditch. This, we believe, is in accord with the plaintiffs' proof. In the eighth paragraph of the opinion the court points to Foster's further testimony that he saw a flashlight 8 to 10 feet to the rear of the truck, and that at that time the plaintiffs were about 65 feet away. It is quite apparent that if the rear of the defendant's truck was only 30 to 40 feet north of the Bartzen truck and that if the plaintiff Foster did not turn his vision forward until the plaintiffs had passed this Bartzen truck, they could not have been 65 feet away from the defendant's truck or the flashlight which Foster testified was 8 to 10 feet to its rear.

It will also be noted from the quoted part of his testimony that Foster stated "he made a movement to nudge Mr. Miller," when he saw the flashlight ahead. Foster later testified that he spoke to Miller about it; that "as I recall, I said there is something wrong here." (Tr. 237.) It is respectfully submitted that Foster's testimony as to what took place at the time can hardly be said to be sufficiently definite to amount to proof, at least of any specific fact.

Toward the end of the eighth paragraph of its opinion the court say:

> "Two matters are seriously controverted: (1) Were there any lights on the rear of the truck with which the plaintiffs' car collided, and (2) did the collision occur within or without the incorporated limits of the Village of Glencoe?"

It is respectfully submitted that there was no real controversy concerning either of these questions. With

regard to the question of lights on the rear of the truck, no witness, not even the plaintiffs themselves, testified that the lights were not burning at the time of the occurrence. The plaintiffs produced two witnesses who testified that they were burning at the time (Tr. 80, 88). Their testimony was corroborated by a number of witnesses, most of them disinterested, called by the defendant (Tr. 338, 339, 359, 389, 399, 406 430, 444). None of the plaintiffs testified that there were no lights on the truck, but merely that they did not see any. They produced as a witness an ex-highway policeman, who arrived at the scene of the accident some 20 minutes later, who testified that at that time the lights were not burning. But he also testified that when the connection was made they came on and that the truck was fully equipped with lights (Tr. 121-122). The controversy, therefore, if any there was, was not between the testimony of witnesses for the plaintiffs and those for the defendant, but as outlined in the eleventh paragraph of the court's opinion between the testimony of certain witnesses produced by the plaintiffs and what they wished the court to infer from their own testimony. In other words, a controversy between the testimony of their own witnesses to the effect that the lights were burning on the truck and the inferences, if any, drawn from their testimony that they did not see any lights on the truck. It is respectfully submitted that such a controversy is of no importance. Under the law of Illinois inferences cannot be weighed against evidence and, where the plaintiffs are relying on negligence in failing to have the lights burning on the truck, the burden was on them to prove the absence of such lights and not to merely create a supposed controversy within their own proof as to whether the lights were or were not burning.

Nor was there any real controversy as to whether limits of the Village of Glencoe. The plaintiffs allege in their complaints that the collision occurred outside any corporate limits and at a point approximately one-half mile north of Willow Road (Tr. 23, 24). On the trial they and their witnesses were in agreement that the accident took place not at the point alleged in the complaints, but at a point a mile or so further north and opposite a large water tower. A map introduced in evidence (Tr. 309) shows that the place of the accident was within the corporate limits of the Village of Glencoe. The controversy here is not on the place where the accident occurred, but, on the contrary, on the question of whether, having alleged the place of occurrence to be a certain point on the highway, and without the corporate limits of any municipality, and having proved it to have taken place at a different point on the highway which is within the corporate limits of a village, they are entitled to the benefit of certain statutes of the State of Illinois which have no application within the corporate limits of such village, on the theory that the defendant did not, in its answers, specifically deny these allegations of their complaints. This question will be further discussed a little further on in the brief.

In the eleventh paragraph of its opinion the court say:

> "There is evidence to the effect that a suitable place was available a short distance north of the point where the defendant's trucks were stopped where they could have parked off the pavement."

It is respectfully submitted that the plaintiffs' evidence in this regard is immaterial. In the first place, there was no reason why the defendant should have parked its trucks off the pavement since there was some 30 feet or more of unobstructed highway for the use of other vehicles at the time. In the second place,

the plaintiffs produced no evidence that the defendant's drivers knew of any such place, even if they could have made use of it. In the third place, the evidence shows that this supposed place was the entrance to a roadhouse some distance north (Tr. 107) and was, of course, private property, not a parking place for trucks. And in the fourth place, the distance to this particular place, as it measures on the map in evidence (Tr. 309), from the place of the occurrence is practically a quarter of a mile.

A little further along in the same paragraph the court say:

> "The evidence as to the absence of any lights on the rear of the truck in question is rather meager."

We believe we have sufficiently considered the plaintiffs' proof concerning the lights. The court state, however, that there is the testimony of all the plaintiffs that they were looking in that direction and saw no lights of any kind. It is respectfully submitted that their testimony in that regard is no more reliable than that of the plaintiff Foster quoted in the seventh paragraph of the opinion in which he stated that he turned his vision forward after they had passed the truck which was in the ditch and which, according to the plaintiffs' proof, was only 30 or 40 feet south of the truck with which they collided. If the plaintiffs were looking forward and failed to see the lights on the truck in question, their testimony in that regard merely proves that they were not observant of what was clearly observable, and were not in the exercise of ordinary care for their safety.

A little further on in the same paragraph, after discussing the testimony of one of the plaintiffs' witnesses, the court say:

"An inference of this kind, however, is largely destroyed by Reid's demonstration."

Why this should be true is not apparent from the court's opinion. This witness testified that Reid went between the trailer and tractor, did something and the lights went on (Tr. 102). It is common knowledge, that the lighting system of a trailer is connected with that of the tractor by a plug and socket. It is quite evident that a car, such as the one in question with five men in it, driving into the rear of the trailer part of this truck at a speed estimated to be as high as 25 miles per hour would give the truck a considerable jolt and might well loosen the plug from its socket. The inference, if any, to be made from Reid's demonstration, it is respectfully submitted, is that just this thing happened. The material facts testified to by this witness, however, is that after the connection was made the lights were all burning on the rear of the truck and that it was well equipped with lights (Tr. 121-122).

At the end of this paragraph, in discussing the testimony of Witness Tokarzcyk, who testified definitely that when he saw the defendant's trucks facing north, north of his truck, that they had lights on the rear (Tr. 80), the court say:

"This witness also testified, however, that he saw two trucks only and inasmuch as it is conceded there were three, such testimony proves nothing insofar as the third truck was concerned."

It is respectfully submitted that this is not a correct interpretation of this witness' testimony. It will be noted from his testimony (Tr. 73) that his testimony concerning the number of trucks was based on his observation as they approached and while he was attempting to pull the Bartzen truck onto the pavement. It will also be noted that his testimony with regard

to the lights was made with reference to what he observed after these trucks had passed to the north of his truck (Tr. 80).

But Witness Tokarczyk was not the only witness produced by the plaintiffs who testified that the lights were burning on the rear of the defendant's truck. Witness Thuerek testified that this particular truck had lights on it (Tr. 88). It is respectfully submitted that the testimony of these witnesses disproved the plaintiffs' charges that there were no lights on the rear of the truck in question.

At the beginning of paragraph sixteen of its opinion the court states:

> "It is not contended that the plaintiffs were driving at an excessive rate of speed."

It is respectfully submitted that the court, in making this statement, wholly lost sight of the defendant's theory of the case. It would seem that if the court had considered the plaintiffs' own proof that the car in which the plaintiffs were riding skidded a distance of 75 feet on a dry pavement and was still traveling at a speed as high as 25 miles per hour, or even 12 to 20 miles, the lowest estimate, at the time of the impact it would have come to the conclusion that they were driving at an excessive rate of speed, regardless of their contention that they had not been traveling in excess of 45 miles per hour. A disinterested witness for the defendant testified that the plaintiffs approached the scene of the occurrence at a speed of between 70 and 80 miles per hour (Tr. 360) and that at the time they arrived at the scene of the accident they were still traveling around 65 to 70 miles per hour. Witnesses for the defendant also testified that the skid marks left by the car measured not 75 feet, as the plaintiffs' proof showed, but approximately 200 feet (Tr. 339, 388,

389, 408, 445). The defendant did contend, both on the trial and in the Circuit Court of Appeals, that the plaintiffs were driving at an excessive rate of speed. The plaintiffs' proof, even though the defendant's evidence is disregarded, we submit, substantiates this contention.

For the reasons above stated, it is respectfully submitted that the Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the evidence to such an extent that its judgment should be reviewed by this Court.

II.

The Circuit Court of Appeals failed to follow the law of Illinois governing the burden of proof.

1. The occurrence complained of took place in Illinois. The plaintiffs' causes of action, if any, are governed by the law of that state. Under these circumstances it was the duty of both the District Court and the Circuit Court of Appeals to follow the law of Illinois in arriving at their decisions.

The occurrence complained of took place within the limits of the State of Illinois. The plaintiffs' causes of action, if any they had, are governed by the Illinois law. The trial was had in the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Illinois. Under these circumstances it has been well settled by this Court that both the District Court and the Circuit Court of Appeals are bound to follow the law of Illinois, both statutory and as it is laid down in the opinions of its courts. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 at 80; *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223 at 236-237; *Fidelity Trust Co* v. *Field,* 311 U. S. 169 at 177.

2. The law of Illinois is well settled that, in an action of this kind, the burden is on the plaintiff to prove freedom from contributory negligence on his own part, negligence on the part of the defendant, and that the negligence, if any, of the defendant was the proximate cause of his injuries.

The law of Illinois with respect to the burden of proof differs from that of many other states and the former practice in the Federal Courts of the Seventh Circuit, particularly on the question of contributory negligence. In Illinois the burden is on the plaintiff to prove the exercise of ordinary care on his own part or his freedom from contributory negligence, as well as proving that the defendant was guilty of the charges laid in his complaint, and that the negligence, if any, of the defendant was the proximate cause of his injuries. The rule is succinctly stated in the case of *Munsen* v. *Illinois Northern Utilities Co.,* 258 Ill. App. 438, where the Court say at page 444:

> "The burden of proof rested on appellant to show affirmatively: (1) that appellee was guilty of the negligence charged; (2) that such negligence was the proximate cause of the injuries in question; (3) that just prior to and at the time of said injury Burroughs was in the exercise of ordinary care for his own safety."

See to the same effect *Dee, Admr.* v. *City of Peru,* 343 Ill. 36, at 41, and *Wilson* v. *I. C. R. R. Co.,* 210 Ill. 603 at 606.

Under this rule if the plaintiffs failed to prove any one of these three propositions, the defendant was entitled to a verdict. And it follows that if the plaintiffs failed to produce any evidence tending to prove any one of them the trial court should have directed a verdict for the defendant.

3. It is also well-settled law in Illinois that a plaintiff must produce positive, affirmative proof of actionable negligence and that damages cannot be assessed on surmise or conjecture.

This rule is concisely stated in the case of *Deming* v. *Hallberg,* 221 Ill. App. 180, where the court say at page 183:

> "No damages can be assessed upon mere surmise or conjecture as to what possibly happened to cause the accident. The law requires affirmative, positive proof of actionable negligence as the proximate cause of injury suffered to warrant an assessment of damages. *International Harvester Co. of New Jersey* v. *Industrial Board,* 282 Ill. 489.
>
> "Proof that the negligence averred was the proximate cause of the accident cannot be dispensed with. *Curran* v. *Chicago & W. I. R. Co.,* 289 Ill. 111; *Sehnert* v. *Shipper & Block,* 193 Ill. App. 202."

See to the same effect *Rittler* v. *Industrial Com.,* 351 Ill. 338 at 353; *McCormick H. M. Co.* v. *Gabris,* 130 Ill. App. 624 at 631.

It is respectfully submitted that the Circuit Court of Appeals in its opinion lost sight of these well-established rules of Illinois law. In the eleventh paragraph of its opinion the court virtually admits that the plaintiffs' evidence concerning the absence of lights on the rear of the truck in question merely raises a doubt as to whether the lights were burning or not. But under these rules of law merely raising a doubt as to whether a fact existed is not sufficient. The burden was on the plaintiffs to produce some positive, affirmative proof that there were no lights. In the thirteenth paragraph of its opinion, in considering the charges of negligence laid in the plaintiffs' complaints, the court points to no evidence which tends to prove any of the charges. Under the law of Illinois it was incumbent upon the plaintiffs

to produce some positive, affirmative proof of at least one of the charges laid in their complaints. The court was apparently unable to state which, if any, of the charges was supported by the plaintiffs' proof. If they had produced any such proof there could have been no difficulty in pointing it out and the particular charge to which it was applicable. It is respectfully submitted that the court's discussion of the plaintiffs' proof with reference to these charges shows that the question of the defendant's negligence was left merely to conjecture or surmise.

It is respectfully submitted that the same is true with respect to the question of the plaintiffs' contributory negligence as considered by the court in paragraphs 14 and 15 of its opinion. Under the law of Illinois, it was incumbent upon the plaintiffs to prove that they were free from such negligence,—that they were in the exercise of ordinary care for their own safety. The court fails to point to any proof of ordinary care on the part of the plaintiffs and concludes in the sixteenth paragraph that they were confronted with "an extraordinary situation." But the court also points out that what it has termed "an extraordinary situation" was apparent to the plaintiffs long before they arrived at the scene of the occurrence. It then became incumbent upon them to take this into consideration as they approached it. Their proof, however, shows that they did nothing until they arrived within some 75 feet of the defendant's truck when the brakes were applied, but at that time it was too late at the speed at which they were traveling.

III.

The evidence is insufficient to support the verdicts.

1. The plaintiffs were guilty of negligence, as a matter of law, which contributed to cause their injuries.

The testimony of the plaintiffs themselves concerning the facts surrounding the occurrence is quite meager, hazy, indefinite and uncertain. Although they were all engineers, men of experience, and were in a position to know the facts, if they had been at all observant, according to their testimony they either knew little of what took place before and at the time of the occurrence, or were unwilling to disclose what they knew. They were reticent and evasive. This was particularly true of the plaintiffs, Miller, who was driving, and Foster, who occupied the front seat with him (Tr. 221-240, 270-280). About the only thing concerning which the plaintiffs agreed definitely was that they were not driving in excess of 45 miles per hour; that the car in which they were riding was driven straight into the rear of the defendant's truck, and that as a result of the collision they were injured. The only just deduction, we submit, that can be made from their testimony and that of the witnesses called by them is that the plaintiffs were not in the exercise of ordinary care for their own safety and that the proximate cause of their injuries was their own negligence.

The facts in the case at bar are quite similar to those in the case of *Cooney* v. *F. Landon Cartage Co.,* 308 Ill. App. 444. In that case the defendant's truck was being driven east on Route 64, which is also a 4-lane highway. The truck ran out of gas and the driver left it standing on the outer lane of the highway, while he proceeded to a gas station to purchase some gas. The

lights were burning on the rear of the truck. The plaintiff's intestate was driving a Plymouth, approaching from the west, and drove head-on into the back end of the truck, apparently without swerving to the right or left. Skid marks were left on the pavement estimated to be at least 100 feet in length. The court, in reversing a judgment for the plaintiff, say, at page 450:

> "Under the evidence, as given at the trial, the defendant seriously contends that plaintiff intestate was guilty of contributory negligence, and even conceding, which they do not, that the driver of the truck was negligent in the way he left his truck on the highway, the plaintiff is barred from recovery in this case.
>
> "The parties were called as witnesses that were riding in the Buick car at least 300 feet back of Earl T. Cooney, as he approached the truck in question. The majority of these people saw the lights on this truck at least four or five hundred feet from it. When they could see these lights, what was there to prevent Earl T. Cooney from seeing them in time to avoid a collision? There was no one approaching from the east and no one near him in the second east-bound lane of traffic, but from the evidence, it appears that he did not see the truck at all until within about 100 feet from it. This is indicated by the skid marks of his car. This court is reluctant to set aside a verdict of a jury for the reason that the evidence shows that the plaintiff's intestate was guilty of negligence which was the contributing cause to the injuries, but in this case it seems to us that if plaintiff's intestate had been observing the road ahead, he certainly should have seen the lights of the truck in the road in time to avoid a collision. Under the evidence in this case, the judgment cannot stand."

The court reversed the judgment and remanded the cause. Thereafter, on motion of the plaintiff, the remanding order was stricken and a petition for leave to

appeal filed in the Supreme Court. This petition was denied, 308 Ill. App. xv.

With regard to this case, the court say in the fourteenth paragraph of its opinion:

> "The case of *Cooney* v. *F. Landon Cartage Co.*, 308 Ill. App. 444, strongly relied upon, furnishes defendant little, if any, support. There the driver of the parked truck had run out of gas and was forced to leave his truck standing on the highway."

On the other hand the court indicates that the case of *Fitzpatrick* v. *C. & H. Sugar Ref. Corp., Ltd.*, 309 Ill. App. 215, and the case of *Bos* v. *Richards*, 71 Fed. (2d) 292, similar somewhat to the *Fitzpatrick* case on the facts, are controlling.

The court seem to have distinguished the *Cooney* case from the case at bar on the ground that the defendant's driver was forced to stop by reason of having run out of gas. But the reason for stopping, or whether there was no reason at all, could have no bearing on the question of the plaintiffs' contributory negligence. The facts in the *Cooney* case, we submit, are almost identical with those in the case at bar so far as the plaintiff's contributory negligence is concerned. In that case, as in the case at bar, the accident happened on a 4-lane highway; the defendant's truck was parked on the outer lane; the lights were burning on the rear of the defendant's truck; there was no traffic on the inner lane to interfere with the car approaching from the rear; there was no traffic approaching from the opposite direction; there were three clear traffic lanes to the left of the defendant's truck in which the plaintiff's intestate might have passed, had he been observant. About the only difference in the facts is that in the *Cooney* case the car driven by the plaintiff's intestate skidded a distance of 100 feet, instead of 75 feet, as the plaintiffs' evidence

shows to be the case in the case at bar. But, we respectfully submit, whether it skidded 100 feet or 75 feet is immaterial.

On the other hand, the facts in the *Fitzpatrick* case bear little, if any, resemblance to those in the case at bar. In that case the accident took place on a 2-lane highway and not a 4-lane highway, as in the case at bar. It was raining and the pavement was wet. In the case at bar the weather was clear and the pavement dry. In that case the plaintiff's husband and the defendant driver had been engaged in showing a moving picture. They left town at the same time. The car in which the plaintiff was riding was following that of the defendant at a distance of about 100 feet. This was known to the defendant's driver. Both cars had been driving some 40 to 45 miles per hour. The defendant's driver, without signalling, slowed down and stopped on the pavement. The plaintiff's husband was unable to stop or to turn to the left to avoid the defendant's car, due to the slipperiness of the pavement, and collided with its rear. In the *Bos* case the accident also occurred on a 2-lane highway. It was sleeting, raining and freezing. The lighting system on the defendant's truck failed. It was a disputed question of fact as to whether the defendant driver had placed flares in the road to warn of his presence and also whether or not he could have driven onto the shoulder. It is respectfully submitted that neither of these cases could be controlling of the decision in the case at bar. They bear little analogy, if any at all, either on the facts or on the pleadings.

The facts in the case at bar, we submit, are even stronger against the plaintiffs than those in the *Cooney* case since the plaintiffs' evidence shows not only that the driver of the car in which they were riding should have seen the truck in time to have avoided the acci-

dent, had he looked, but also that he was forewarned by the flares placed on the highway by the drivers of the trucks on the other side of the road that an accident had occurred and that traffic ahead of him could be expected to stop in order to render assistance.

The plaintiffs' theory of their cases is, as it was in the *Cooney* case, that the defendant, in stopping and parking its trucks on the highway, violated certain statutes, and that such supposed violations of the statutes was negligence on its part. We believe the evidence disproves any such contention, as we shall point out a little later on. Suffice it to say here that, even under their theory, if the trucks had not been stopped and parked, but had been moving at all, even slowly, there would have been no such supposed violation of these statutes. The plaintiffs' proof shows that at the time of the collision, even after having skidded on a dry pavement for a distance of 75 feet, the car was still traveling, according to their own estimates at a speed of 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 169), or 12 to 20 miles per hour (Tr. 234). If the trucks, therefore, had been traveling slowly, as they rightfully might have done, it is clear from the plaintiffs' testimony that the collision would have occurred nonetheless. It was, therefore, not the stopping and parking of the truck in question on the highway, even if that were negligence, which it was not, that caused the accident but, on the contrary, the negligence of the plaintiffs in failing to observe its presence there and in failing to turn to the left, where they had plenty of room, to avoid it. As was said in the case of *Geisen* v. *Luce*, 185 Minn. 479, at page 484:

> "The only charge of negligence against Ferris is that he permitted his car to stand on the pavement in violation of the statute. It is conceded that if he had been, at the time and place, driving his car

slowly he would not have been guilty of negligence. Under the circumstances, this accident would have happened just the same had the Ferris car been moving slowly. Indeed, had the Ferris car been moving it might have made the situation more dangerous. If the Ferris car while standing bore any relation to the accident, it was solely because of its being on the highway, not because it was a standing rather than a moving car. Its presence was known to all; it created no surprise; it did not obstruct a view of the traffic.

"It seems apparent that even if the standing had been such as to be a violation of the statute, it would not under such circumstances as here involved be the responsible cause, because the accident would not have occurred had it not been for Luce's negligence, which was an intervening, responsible cause, it not being a consequence of the 'standing.' In other words, upon the facts most favorably stated for the plaintiff, there was no causal connection between the 'standing' of the Ferris car and the accident; and without such causal connection there can be no recovery."

In the case of *Hogrefe* v. *Johnson,* 271 Ill. App. 469, the plaintiff drove his car into the rear of the defendant's car which was traveling at a speed of about 5 miles per hour, preparatory to leaving the pavement for the purpose of wiping the frost off his windshield. It was foggy, rainy, and freezing weather. The plaintiff's vision was interfered with by the frost on his windshield, but, according to his testimony, he was driving at a speed of 25 miles per hour. In reversing a judgment for the plaintiff, the court say, at page 473:

"The rights of persons operating automobiles upon public highways are equal and their duties towards one another are reciprocal; and persons operating automobiles upon the public highways, if in the exercise of ordinary care, should be on the alert for other cars upon the highway. Persons operating

automobiles are chargeable with notice that others are to be expected to be using such highway, and they owe a mutual duty to each other to exercise reasonable care to avoid collision.

"Whenever a person has contributed essentially to his own injury by his own negligence, the law will give him no redress. *Collins* v. *McMullin,* 225 Ill. App. 430. The question resolves itself into one as to whether or not the plaintiff's conduct was the proximate cause of his injury, and if so, his contributory negligence will bar his recovery.

"In *Harrison* v. *Binghcim,* 350 Ill. 269, with reference to duties of the plaintiff, it is stated: 'It was his duty to use reasonable care to have his automobile under such control as would enable him to avoid collision with other automobiles, whether parked along the curbing or traveling in the accustomed line of traffic.'

"A recovery in this case cannot be had or sustained unless it is affirmatively shown by the evidence that the plaintiff was in the exercise of due care for his own safety. The facts relative to the care exercised by him are not in dispute and they plainly indicate a disregard for his own safety. After carefully reviewing the present record, and considering all the facts and circumstances in evidence, we are of the opinion that the judgment appealed from cannot stand. We do not believe that the defendant is under any liability to the plaintiff. In our opinion, it clearly appears from the preponderance of the evidence that the damages suffered by the plaintiff were the result of and caused by his own negligence; and that his contributory negligence was the proximate cause of his injuries.

"He was aware of the weather conditions, the poor visibility, and the treacherous condition of the highway. Under such circumstances, it was his duty to keep a sufficient lookout ahead that would have enabled him to discover other vehicles upon the highway traveling in the same direction as himself, and to have operated his automobile in such

a manner as to either be able to stop the same, or to have passed the automobile in front of him in the usual and ordinary manner, the road then being clear."

In the *Hogrefe* case the opinion indicates that the plaintiff had one traffic lane clear of traffic in which to pass defendant's car to the left. In the case at bar the plaintiffs had three clear traffic lanes in which to pass, to make no mention of the shoulder.

In the case of *Johnson* v. *Kushler,* 269 Ill. App. 553, the plaintiff drove his automobile into the back of a tractor and trailer, alleged to have been standing on the highway. There was a dispute as to whether or not it was standing and whether there were lights burning on the back of the trailer. The plaintiff's car was being driven with the dim lights instead of the bright, and traveling at approximately 35 or 40 miles per hour. In reversing a judgment for the plaintiff, the court say, at page 561:

"We do not think that defendant is under any liability to plaintiff because, in our opinion, it appears from a clear preponderance of the evidence that the damages suffered by plaintiff were proximately caused by his own negligence and that of the young woman driving his car at the time as his agent and servant. (See *Hanusik* v. *Hanlon,* 258 Ill. App. 114, 119; *Johnson* v. *Newman,* 168 Ark. 836, 839, 840.) Each was guilty of contributory negligence in not keeping a sufficient lookout ahead that would have enabled them, had they been looking, to have discovered defendant's trailer and truck as they were approaching them, and to have checked or stopped the automobile in which they were riding in time to have avoided the collision. (See *Johandes* v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328, 331, 332; *Phillips* v. *Davis,* 3 Fed. (2d) 798, 799; *James* v. *Motor Transit Management Co.,* 260 Ill. App. 246, 257.) Furthermore, it clearly appears under all the

> facts and circumstances in evidence in this case that the plaintiff was negligent in allowing his car to be driven on a dark, though clear, night, on a highway in a country district without having his bright headlights burning."

The Appellate Court reversed the case without remanding.

In *James* v. *Motor Transit Management Co.*, 260 Ill. App. 246, the plaintiff ran into the back of defendant's bus which had run out of gasoline and was left standing with the rear end protruding onto the highway. In reversing a judgment for the plaintiff the court say, at page 256:

> "It is clear that the manifest weight of the evidence shows that there were lights burning on this bus at the time of the accident. It is also clear that it shows that motor cars approaching it from either direction did discover the bus within distances of 30 yards to half a mile and in ample time to turn around it and pass it without a collision, and that the plaintiff by the exercise of ordinary care could have seen the bus in ample time to have avoided the collision. Under the circumstances shown in the evidence, it becomes immaterial just to what extent the rear end of the bus extended over the west side of the pavement or whether the tail light was in fact lighted. The main fact is established by the manifest weight of the evidence that the bus was visible to anyone approaching from either direction at a sufficient distance so that it could be seen by the use of ordinary care in ample time to avoid colliding with it."

In the case at bar the plaintiff Miller who was driving the car in question, testified that he was unable to estimate the distance between him and the truck when he first saw the truck (Tr. 277). Two of the plaintiffs, however, testified that they did see it, one of them when it was 65 to 75 feet away and the other when it was 40

to 50 feet away. What was visible to them must have been visible to the plaintiff Miller had he been observant. Had he seen the truck at either of these distances, he would have had ample time to avoid colliding with it, if it is a fact that the car was being driven at no greater speed than, according to the testimony of the plaintiffs, it was being driven.

In the case of *Collins* v. *McMullin,* 225 Ill. App. 430, the defendant's car ran into the back of the plaintiff's automobile, while the latter was stopped upon the highway. It was alleged that there was ample room for the defendant to have passed the plaintiff's automobile without colliding with it. A judgment for the plaintiff was reversed for errors committed on the trial, but in the course of its opinion, however, the court say, at page 433:

> "If the appellee's automobile was standing in the road under the circumstances recited in the additional count, that is to say, in plain view of the appellant and the appellant saw the car, or by the exercise of ordinary care and caution could have seen it in ample time to have turned aside without injuring it, as alleged in the additional count, and did not do so, the appellant would be guilty of actionable negligence."

Similar conclusions have been reached by the courts of other jurisdictions where the law is similar to that of Illinois. *Boylon* v. *Reliable Cartage Co.,* 258 Mich. 5 at 9; *Levine* v. *Bishop,* 292 Mass. 277 at 279; *Billingsley* v. *McCormick Transfer Co.,* 58 N. D. 920.

The case of *Cooney* v. *F. Landon Cartage Co.,* 308 Ill. App. 444, cited and quoted from above, was decided in February, 1941. The controlling facts in that case, as we have pointed out, do not differ materially from those in the case at bar. The holding in that case is in accord with a long line of decisions of the Illinois Courts in-

volving similar facts and is in accord with the decisions in other jurisdictions. In accordance with the law as laid down in these cases, the driver of an automobile who drives his car into the rear of another vehicle standing on the highway, even though it is illegally so standing, which we do not concede to be the case in the case at bar, is guilty of contributory negligence as a matter of law which bars his right to recover where, as here, in the exercise of ordinary care, he should have seen such vehicle and has an opportunity to avoid colliding with it.

While under the law of Illinois the negligence of the driver of an automobile cannot be imputed to the passengers, a passenger cannot excuse himself from the exercise of ordinary care simply because someone else is driving the car. There can be no question from the plaintiffs' proof that the presence of the defendant's truck on the highway should have been observed by all of the plaintiffs in ample time to have avoided it had they only looked. All, we submit, were guilty of contributory negligence in failing to keep a proper lookout, and the court erred in failing and refusing to direct a verdict for the defendant as to each of them.

Even if it could be contended that the passenger-plaintiffs were not equally as guilty as Miller in this regard, which we shall presently show could not, the plaintiff Miller, at least, was guilty of contributory negligence as a matter of law and the Circuit Court of Appeals was in error in affirming the judgment in his favor.

2. If the plaintiffs were unable to see clearly ahead, it was negligence on their part to drive with the dim lights only, particularly when the bright lights were available.

The plaintiffs attempt to excuse their failure to avoid colliding with the standing truck on the ground that

they were unable to see it in time to stop or avoid it. Their proof, however, does not sustain any such contention, but, as we have pointed out above, on the contrary, shows that they could have seen it, had they merely been observant.

The evidence shows that the accident happened out in the open country and that there were no lights along the road. The plaintiffs admitted and their proof shows that they were driving with the "town" or "dim" lights. How far they were able to see along the highway with these lights does not appear from the evidence. Neither Miller, the driver of the car, or Foster, who was seated in the front seat with him, would even estimate the distance these lights lighted up the pavement ahead (Tr. 274, 226). Although they testified they had used these lights all the way out to the place of the accident, they had no opinoin at all as to how far objects were discernible ahead of them. There is no evidence of any traffic approaching them from the opposite direction, necessitating the use of the dimmer lights. The car was equipped with bright lights (Tr. 274), but they were never turned on (Tr. 275). The fact that they were driving with the dimmer lights, as well as the fact that they were approaching a place where other vehicles were in trouble, must have been as obvious to the other plaintiffs as it was to the driver. Ordinary prudence would dictate that under the circumstances the brighter lights should have been turned on to enable them to see what was ahead, or the speed of the car should have been checked sufficiently to enable it to be stopped in time to avoid objects within the range of their vision. Neither of these precautions were taken and in addition to this, Miller, the driver, testified that he had no idea at all what distance it would take him to stop at the speed at which he was driving (Tr. 277). The evidence does not show that any of the plaintiffs remonstrated, either

with regard to the lights or the speed at which the car was being driven, or that any of them did anything about it. The evidence is clear that there was no excuse for failing to make use of the bright lights and to have done so would have increased their range of vision and objects would have become discernible at a much greater distance. If, in fact, as the plaintiffs contend, they were unable to see the defendant's truck with the dimmer lights, it was negligence on their part to fail to make use of the bright lights.

The Circuit Court of Appeals in considering the fact that the plaintiffs were driving with the dimmer lights, says in the fifteenth paragraph of its opinion:

> "With the condition of the atmosphere, foggy, and hazy, as shown, at and near the point of the collision, it is purely a matter of speculation as to whether the bright lights would have been of assistance. There is room for the thought that they might have been harmful rather than helpful."

It is respectfully submitted, however, that the court has again lost sight of the fact that the burden was on the plaintiffs to produce proof which would take this question out of the realm of speculation. The brighter lights were available to them, but they were not used. It is common experience that one can see plainer and farther with the brighter lights. That is the purpose of such lights. If they could not see ahead, the exercise of ordinary care on their part required that they at least try the bright lights. Their proof is that they never tried them. They produced no proof whatsoever that the use of them would have been of no avail.

The situation was closely analogous to that in the case of *Scruggs* v. *Baltimore & O. R. Co.*, 287 Ill. App. 310, in which the plaintiff, a passenger in a car, being driven with the dimmer lights, was injured by the car colliding

with a box car at a railroad crossing. The court, in affirming a judgment rendered upon a verdict directed in favor of the defendant say, at page 315:

> "It is manifest that if the car had been burning the proper lights, as plaintiff knew it was not, and yet made no objection thereto, and had she been properly observant, she would have seen the box car in time to warn the driver and thus avoid the accident. It seems that the plaintiff, as stated in *Hardie* v. *Barrett, supra,* joined with the driver 'in testing manifest danger.' "

The facts in the case at bar are also closely analogous to those in the case of *Johnson* v. *Kushler,* 269 Ill. App. 553, in which the plaintiff's car, while being driven with the dimmer lights instead of the bright, collided with the rear end of a truck alleged to have been standing on the highway. In reversing a judgment for the plaintiff, with a finding that the plaintiff was guilty of contributory negligence, the court say, at page 561:

> "Furthermore, it clearly appears under all the facts and circumstances in evidence in this case that the plaintiff was negligent in allowing his car to be driven on a dark, though clear, night, on a highway in a country district without having his bright headlights burning. (*Johnson* v. *Gustafson,* 233 Ill. App. 216, 233; *Sugru* v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99, 102, 103.)"

In the case of *Johandes* v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328, the plaintiff was injured when the car he was driving collided with a train at a railroad crossing. It was a foggy night and the plaintiff was driving with only his dim lights burning. The court, in affirming a judgment entered on a verdict directed for the defendant, after considering a large number of cases from this and other jurisdictions, say, at page 332:

> "These expressions and others of similar nature are applicable to the instant case. If the plaintiff

had his bright lights on, as the circumstances demanded and the law required (*Johnson* v. *Gustafson,* 233 Ill. App. 216), he would have seen the passing train in ample time to stop and avoid the accident."

In the case of *Sugru* v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99, the plaintiff was injured when the car in which she was riding collided with the rear end of a taxicab which had stopped for the purpose of repairing its lighting system. The car in which she was riding, although equipped with headlights, was being driven with only the cowl lights and a spotlight burning. In reversing a judgment for the plaintiff, the court say, at page 102:

"If the headlights had been lighted on the Sugru car, as required by statute, the Yellow Cab of appellant would have been visible to appellee and her husband a considerable distance further away than it was when only the parking lights and the spotlight were used. It is also probable that if the headlights had been lighted they could have seen the man who was trying to stop them, in time to have avoided the collision. It is undisputed that the passenger who was standing on the east side of the cab was yelling and waving his arms in an attempt to stop the Sugru car, but that it did not stop and crashed into the rear end of the cab.

"No reason is apparent why appellee did not know that the car in which she was riding was being driven without the headlights burning, or why she did not request her husband to turn on and use them. While it is true the negligence of her husband could not properly be imputed to her, still she was responsible for her own negligence if it contributed to her injury. Where the negligence of the person who receives the injury contributes to the injury, he cannot escape the consequences of his own carelessness. If the person riding in the vehicle knows that the driver is negligent and takes

> no precaution to guard against injury, he cannot recover, for, in such case the negligence is his own and not simply that of the driver. The plaintiff cannot lawfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge. (*Flynn* v. *Chicago City R. Co.*, 250 Ill. 460.)"

The burden was on the plaintiffs to prove that they were in the exercise of ordinary care for their own safety. One of the essential elements in the exercise of ordinary care while riding in a car in the nighttime is to see that proper and sufficient lights are made use of to enable the driver to see objects ahead in time to avoid colliding with them. The burden was on the plaintiffs to prove this essential element of their exercise of ordinary care. They produced no such proof. On the contrary, their proof shows that the car was being driven with only the dimmer lights; that they had no idea how far these lights made objects discernible, and that the collision was due to their failure to see the defendant's truck. Under the circumstances in evidence, the failure on the part of the plaintiffs to make use of the bright lights instead of the dim was negligence on their part and such negligence was the proximate cause of their injuries.

3. If the "smoke," "fumes," "fog" or "smudge" from the flares did, in fact, obscure the vision of the plaintiffs, they were negligent in failing to slow down to such speed as would enable them to stop within the range of their vision.

On the trial it was contended by the plaintiffs that the fusees set out by the truck drivers along the west side of the highway created a fog, smoke, red glow, smudge or haze that obscured their vision (Tr. 136, 147, 157, 175, 181, 203, 232, 247, 248, 273, 275). This contention, we submit, appears to be without merit since there was only some 6 or 8 fusees burning (Tr. 97).

Even if there had been twice as many, they were strung out for a distance of about 200 feet along the west side of the highway (Tr. 80-81) and it is quite unlikely that the trifling amount of smoke given off by this number of fusees over that distance could have obscured their vision to any considerable extent, if at all. However that may be, if there was any smoke or smudge or haze created by these fusees, it must have been perfectly obvious to the plaintiffs as they approached the place in question.

Nor are they in agreement at all as to the extent that their vision was obscured. The intensity of this fog or smoke or haze caused by the fusees seemed to increase as the trial progressed. The plaintiff Wagner testified that "it was foggy, smoke from these fusees and just a red glow in the whole neighborhood" (Tr. 136). The plaintiff Shoffner described it as "sort of a hazy or foggy red glow" (Tr. 157). The plaintiff Browne stated that the atmosphere and landscape was "a murky red" (Tr. 181). The plaintiff Foster stated "it was a sort of an Indian summer haze. That is, just a slight smoke, which was not thick enough to mar your vision, to obscure your vision" (Tr. 203). Foster changed his opinion on cross-examination and testified that it was practically invisible to see through the smoke (Tr. 232). By the time the plaintiff Miller took the stand, the smoke had gotten so thick that, according to his testimony, when he came to the place where this smoke obscured his vision he would not say that he could see as much as 10 feet ahead of his car (Tr. 274). Yet, according to the testimony of plaintiff Miller, without any idea of how fast he was traveling, without changing his lights in order to see better, and without any idea in what distance he would be able to stop (Tr. 275-277), he proceeded through the smoke.

While it would seem incredible that a few fusees such as truck drivers are required by the statute to carry in their trucks could give off such a volume of smoke as the testimony of the plaintiff Miller indicates obstructed his vision, we submit that, if it appeared to him to be as dense as he testified it was, it was negligence on his part, and of the other plaintiffs as well, under the circumstances shown by the evidence to proceed through it. The exercise of ordinary care on their part should have dictated that they stop until it blew away and the road cleared before proceeding.

The law is well settled that it is the duty of the driver of a vehicle to stop when his vision is obscured by a temporary obstruction, such as fog, or bright lights, or a smoke screen, when his failure to do so would jeopardize his own or the safety of others, and to remain at a standstill until such temporary obstruction has come to an end. *Johandes* v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328, at 331-332; *Hazel* v. *Hoopeston-Danville Motor Bus Co.,* 229 Ill. App. 125 at 132; aff. 310 Ill. 38; *Ill. Cent. R. R. Co.* v. *Oswald,* 338 Ill. 270 at 275; *Dominick* v. *Haynes Bros.,* 13 La. App. 434 at 435; 127 So. 31; *Bong* v. *Webster,* 217 Ky. 781 at 786; 290 S. W. 662.

In the case of *Dominick* v. *Haynes Bros.,* 13 La. App. 434, the plaintiff and defendant were approaching each other upon a highway which was obscured by heavy smoke from burning grass on the roadside. Neither driver could see but a few feet ahead. The collision, however, occurred on the plaintiff's side of the road, the left wheel of the defendant's car being about 2 feet over the center of the road on the plaintiff's side. The court held both to be negligent and in sustaining a judgment for the defendant say, at page 435:

> "It was negligent for both drivers or either of them to enter the smoke screen that prevented them from seeing any appreciable distance ahead. It was

also negligence to drive at a rate of speed of 15 miles per hour after having entered the smoke.

"The facts of this case, including the width of the road and all, are very similar to the case of *Castille* v. *Richard,* 154 La. 274, 102 So. 398, 37 A. L. R. 586, in which the court held: 'Drivers of automobiles on narrow road approaching in opposite direction, who fail to stop until impenetrable cloud of dust raised by third automobile in passing one of them had subsided, held negligent.'

"The court in this case held both parties negligent and rejected their demands.

" 'It is the duty of the driver of an automobile to stop his car when his vision is entirely obscured by a temporary obstruction, such as a cloud of dust or smoke screen. When failure to do so would jeopardize the safety of others, then he must remain at a standstill until the obstruction has come to an end.' *Blashfield's Encyclopedia of Automobile Law,* Volume 1, page 370."

In accordance with the law as laid down in the foregoing decisions we respectfully submit that if the smoke from the fusees along the roadside did obscure the plaintiffs' vision, or even if they only believed it was obscured by such smoke, it was negligence on their part to proceed until such precautions were taken as would enable them to see objects ahead in time to avoid colliding with them and that, having failed to take such precautions, they are not entitled to recover.

4. Where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it.

We believe we have sufficiently pointed out above that the evidence shows conclusively that the plaintiff Miller, the driver of the car in which the plaintiffs were riding, was guilty of negligence, as a matter of law, which caused or contributed to cause his injury and

that the court erred in affirming the judgment in his favor.

There remains the question whether the other plaintiffs, being passengers in the car driven by Miller, are also guilty of such negligence. The law is well settled in Illinois that it is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger, to avoid it and to warn the driver of such vehicle of such danger. *Dee* v. *City of Peru,* 343 Ill. 36 at 42; *Willgeroth* v. *Maddox,* 281 Ill. App. 480 at 485; *Opp* v. *Pryor,* 294 Ill. 538 at 547; *Pienta* v. *Chicago City Ry. Co.,* 284 Ill. 246 at 259.

In the case of *Dee* v. *City of Peru,* 343 Ill. 36, the plaintiff's intestate, Joseph Dee, was riding in an automobile driven by one Schuets. They had driven across the bridge at Peru at about 7:30 in the morning and about 9:00 o'clock were returning to Peru. When they returned the draw span of the bridge had been opened to make repairs and a gate or barrier was strung across the approach. Neither Dee nor Schuets noticed the barrier or that the draw span had been opened. Schuets drove the automobile up to and over the south portion of the bridge, through the barrier and into the river. Schuets succeeded in disengaging himself from the car, but Dee was drowned. His administrator brought an action for wrongful death against the City of Peru. In reversing a judgment for the plaintiff, and holding that the trial court erred in not instructing the jury to return a verdict for the defendant, the Court say at page 42:

> "One having an unobstructed view of a dangerous crossing on a highway is not justified in closing his eyes or failing to look in reliance upon the assumption that the highway is free and open to travel. The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the

> danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it. (Citing cases.) It is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger and to avoid it, to warn the driver of such vehicle of approaching danger, and he has no right, because someone else is driving, to omit reasonable and prudent efforts on his part to avoid danger." (Citing cases.)

In the case of *Willgeroth* v. *Maddox,* 281 Ill. App. 480, Willgeroth and Maddox were riding in a car driven by Maddox at a speed of approximately 60 miles per hour, while approaching a railroad crossing. There was a freight train approaching the crossing at approximately 50 miles per hour. The speed of the car was maintained up until it was within 75 or 100 feet of the tracks. When the driver and the passenger first looked at the engine they were perhaps 15 feet from the crossing. Both were killed by the collision. The administratrix of the estate of Willgeroth brought action against the administratrix of the estate of Maddox. In reversing a judgment for the plaintiff, the court say at page 485:

> "That each of these parties was guilty of the grossest negligence in not discovering the approaching freight train is beyond question. From the evidence in this case we are of the opinion that Maddox and Willgeroth were guilty of negligence or wilful and wanton conduct of the same degree, as they both had equal opportunity to observe the approaching train."

That case was remanded to the trial court. Thereafter the trial court entered judgment for the defendant notwithstanding the verdict for the plaintiff. On a second appeal, this judgment was affirmed, 286 Ill. App. 622, and petition for leave to appeal was denied by the Supreme Court, 286 Ill. App. xlvii.

In the case at bar the plaintiff Foster was seated in the front seat beside the plaintiff Miller who was driving, as was the case in the *Dee* and *Willgeroth* cases quoted from above. He had as good an opportunity to observe danger ahead as did the plaintiff Miller. He was aware of the fact that the car was being driven with only the dim lights (Tr. 225) and was in a position to know of the supposed smoke on the highway as well as was the plaintiff Miller. We respectfully submit that the plaintiff Foster was in as good a position to know that they were approaching danger as was the plaintiff Miller within the holdings of the *Dee* and *Willgeroth* cases quoted from above, and that by reason of his failure to observe such danger and to warn Miller thereof he was equally guilty of negligence, as a matter of law, which was the proximate cause of his injury. The court was, therefore, in error in affirming the judgment in favor of the plaintiff Foster.

With regard to the other three plaintiffs, Wagner, Shoffner and Browne, the situation is somewhat, although not materially, different. They were occupying the back seat of the car. Ordinarily they would not have an equal opportunity with the driver of discovering danger. According to their testimony, however, they did observe the fusees burning along the west edge of the highway. They did observe the supposed smoke emitted by these flares, and they were in a position to know the kind of lights with which the car was being driven, and to observe its speed. Their observance of the flares must have indicated to them that there was trouble ahead and served as a warning to them that they should be on the alert to look out for danger. Their testimony, however, shows that they left this wholly to the driver. We respectfully submit that they, too, were guilty of negligence which was the proximate cause of their injuries and that they were not entitled to recover.

5. The fact that the truck was standing on the highway was merely a condition by which the injury was made possible and not the proximate cause of the injury.

The law of Illinois is so well settled as to need the citation of no authority, that a plaintiff, in order to recover, must not only prove that the defendant was negligent, but also that such negligence was the proximate cause of the occurrence by which he was injured. Even if it were conceded, which we submit is not the fact, that the defendant was negligent in stopping its trucks on the highway, such negligence, if any, was not the proximate cause of the occurrence complained of. The defendant's trucks were stopped on the outer or easternmost lane of the highway (Tr. 96). The highway was a 4-lane highway. It is obvious that if the plaintiff's car had been driven on the inner lane for northbound traffic, there would have been no collision. As we have pointed out above, there were three traffic lanes to the west of defendant's trucks in which the plaintiffs could have passed them had they been observant of the condition of the highway ahead. The fact of the defendant's trucks being stopped on the highway, therefore, whether negligently stopped or not, was not the proximate cause of the occurrence in question, but merely a condition by which the occurrence was made possible. It is well settled law that if the negligence of a party sought to be charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury.

In the case of *Briske* v. *Village of Burnham,* 308 Ill. App. 531, the plaintiff was injured when a car in which she was riding collided with a barricade built by certain railroad companies across what had formerly been En-

tre Avenue in the Village of Burnham. This street had been vacated and the land transferred to the railroad companies. The plaintiff brought action against the village and the railroads. The driver of the car testified that as he approached the barricade he was looking for trains along the switch track and did not see the barricade which was an additional 65 feet ahead. The court, in reversing a judgment for the plaintiff and entering judgment for the defendants and against the plaintiff for costs, say in the course of its opinion, at page 536:

> "Had the driver paid attention to his driving and observed the condition of the roadway in front of him, he would have stopped before striking the barricade. As stated in *Dee* v. *City of Peru,* 343 Ill. 36, 42, 'The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it.' The presence of the barricade did no more than furnish a condition by which the injury was made possible. The proximate cause of the injury, however, was the negligence of the driver. For that reason, as a matter of law, none of the defendants is liable."

In the case of *Geisen* v. *Luce,* 185 Minn. 479, a car belonging to one Ferris came to a standstill on the right-hand side of the pavement. Plaintiff was riding with the defendant Luce as a guest when the latter approached the parked car traveling at 50 to 60 miles per hour. Luce swung to the left to go by the Ferris car and when abreast of it discovered a car coming in the other direction at a high rate of speed and to avoid a collision turned into the ditch, injuring the plaintiff. Plaintiff sued not only the driver, with whom he was riding, but the driver of the parked car, charging the latter with violation of a Minnesota statute identical with the statute of Illinois in regard to parking on the paved portion

of the highway. In entering a judgment for Ferris, notwithstanding the verdict, the court say, at page 484:

> "The only charge of negligence against Ferris is that he permitted his car to stand on the pavement in violation of the statute. * * * If the Ferris car while standing bore any relation to the accident, it was solely because of its being on the highway, not because it was a standing rather than a moving car. * * *"
>
> "It seems apparent that even if the standing had been such as to be a violation of a statute, it would not under such circumstances as here involved be the responsible cause, because the accident would not have occurred had it not been for Luce's negligence, which was an intervening responsible cause, it not being a consequence of the 'standing.' In other words, upon the facts most favorably stated for plaintiff, there was no causal connection between the 'standing' of the Ferris car and the accident; and without such causal connection there can be no recovery.
>
> "* * * Even though the standing of the car on the highway may be unlawful, yet the wrongful standing cannot be the proximate cause of an accident unless it results from the standing. While such standing may be the occasion or condition, it is not in a legal sense a contributing proximate cause of the accident. (Citing cases.) The 'standing' of the Ferris car did not set Luce's negligence in operation, nor concur therein. The accident resulted from Luce's excessive speed, his indiscretion in not having his car under control in anticipation of southbound traffic, and his failure to appreciate the impending danger. This conduct on his part constituted negligence, which was the proximate cause of the accident."

The reasoning in this case is applicable to the facts in the case at bar. It was not the standing of the defendant's truck on the highway that caused the accident. The accident would have happened regardless of

whether it was standing or moving. The proximate cause of the occurrence was the negligence on the part of the plaintiffs in failing to observe it and to turn to the left where there was plenty of room to pass it.

In the case of *Jaggers* v. *Southeastern Greyhound Lines,* 34 F. Supp. 667, the court had under consideration a case involving facts very similar to those in the case at bar. In that case the defendant's bus stopped to discharge passengers with the rear end protruding onto the highway, in violation of a statute of the State of Tennessee. The accident happened in the nighttime, the lights were burning on the rear of the bus, and there was plenty of room to pass to its left. There was no traffic from the opposite direction. The court held that the defendant bus company had violated the statute in question, but directed a verdict in its favor, saying in the course of its opinion, at page 669:

> "Having the situation thus in mind, it is to be remembered that the arbitrary terms of the statute are violated only when the vehicle is standing. If the vehicle is moving, no matter how slowly, the statute is not violated. Then would it be reasonable to say because the vehicle was standing, under these conditions, the standing of the vehicle was the proximate cause of the collision? Would not the collision have occurred had the vehicle been moving slowly?
>
> "If this be the situation, then the standing of the vehicle was not a necessary cause of the collision, and would be a remote cause, the proximate cause being the negligence of the driver of the Lefwich car running into the rear end of the plainly lighted bus with ample room to pass on the left.
>
> "* * * There appears to be no reason why Lefwich could not have seen this bus in ample time to avoid striking it and passing to the left where there was full room. He could have done that if he had exercised ordinary care, notwithstanding the bus driver had violated the statute."

In the case of *Gilbert* v. *Goralnik,* 238 Ill. App. 199, the plaintiff brought his car to a stop on the north side of the bridge crossing the river at St. Louis. The plaintiff, who was driving in the same direction, was run into by another car which struck the hub of the left front wheel, causing it to turn suddenly to the right and collide with the car of the defendant. In reversing a judgment for the plaintiff, the court say at page 203:

> "If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. * * *
>
> "We are of the opinion and hold that the striking of the appellee's car by the driver of the said Hudson car was an independent cause bringing about said collision, which had no logical connection with the stopping by the appellant of his car at the place in question, and that the trial court should have directed a verdict for appellant, and the failure to do so was error."

Munsen v. *Ill. Northern Utilities Co.,* 258 Ill. App. 438, was an action to recover amounts paid as compensation to an employe under the Workmen's Compensation Act by reason of injury sustained by the employe when an iron rod in the hands of the employe came into contact with the defendant's transmission wires. An order had been entered on the defendant by the Illinois State Highway Department to raise the wires to 22 feet above the floor of the bridge on which the employe was working. They had been raised to only 13 feet above the floor and it was practically conceded that the defendant was negligent in failing to so elevate the wires. In sustaining a judgment for the defendant, the court say, at page 443:

> "It is also fundamental that if the negligence of the party sought to be charged does nothing more than furnish a condition by which the injury is

made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury."

And again, in discussing the question of proximate cause, at page 444:

"So far as the record discloses, the construction of said bridge was in no way interfered with or hindered by reason of the fact that said transmission wires had not been elevated as required by the State Highway Department. There was no causal connection between the placing of said shacks in repair and the height of said wires. Burroughs was ordered by his foreman to go to said bridge and get a rod to be used in making stable said stove pipe. That in doing so, he should place said rod in contact with said wires, would be improbable. We, therefore, hold that, under the authorities above cited, the evidence fails to support the second proposition."

In the case of *James* v. *Motor Transit Management Co.,* 260 Ill. App. 246, the plaintiff was injured when the car in which she was riding came into collision with a motor bus, the rear end of which was left standing on the paved portion of the highway. The court concluded that the standing of the bus on the highway was not the proximate cause of the injuries, quoting at length from the case of *Powers* v. *Standard Oil Co.,* 98 N. J. L. 730.

In railroad cases involving collision between automobiles on the highway and railroad cars standing across the highway, it has been universally held that the presence of the railroad cars upon the highway is not the proximate cause of the accident but a mere condition or incident. While railroad cases may not be compelling authority upon the question of reciprocal duties owed by motorists upon the highway, they are obviously directly in point on this issue of proximate cause.

Thus in *Gilman* v. *Central Vermont Railway,* 93 Vermont 340, it was held that the action of a railroad in obstructing a crossing for an unlawful length of time in violation of a statute, was merely a condition and not the proximate cause of an injury resulting from a collision with the car. This case was cited with approval in *Coleman* v. *Chicago, B. & Q. Railroad Co.,* 287 Ill. App. 483. See also *Probert* v. *Chicago, I. & L. Ry. Co.,* 93 Fed. (2d) 259 at 261, and *Orton* v. *Penn. R. Co.,* 7 Fed. (2d), 36 to 38.

In accordance with the law as laid down in the above cases cited and quoted from, negligence, if any there was, on the part of the defendant in stopping and parking its trucks upon the highway, merely created a condition by which the occurrence in question was made possible and was not the proximate cause thereof. The proximate cause of the collision and the resulting injuries to the plaintiffs was the subsequent and independent negligence of the driver of the car in which they were riding in failing to observe the presence of the truck and in failing to avoid colliding with it.

6. The proximate cause of the occurrence complained of was the negligence of the driver of the car in which the plaintiffs were riding and the plaintiffs are not entitled to recover.

We believe we have sufficiently pointed out above that under the law of Illinois the plaintiff Miller was guilty of negligence, as a matter of law, which was the proximate cause of his injuries and that the court was in error in affirming the judgment of the trial court in his favor.

We believe we have also sufficiently pointed out that under the law of Illinois the plaintiff Foster, who was seated in the front seat of the car, and had an equal opportunity to observe the manner in which the car was

being driven and objects ahead, was, as a matter of law, equally guilty of negligence which was the proximate cause of his injuries.

We believe, also, that we have sufficiently pointed out that under the law of Illinois the other plaintiffs, Wagner, Shoffner and Browne, although seated in the rear seat of the car, had sufficient opportunity to observe the manner in which the car was being driven and to observe the truck in question, were also guilty of negligence which was the proximate cause of their injuries. However that may be, as we have pointed out above, the fact that the defendant's truck was standing on the highway, was merely a condition which made the occurrence possible and the negligence, if any there was, of the defendant in causing it to be stopped was not the proximate cause of their injuries. The proximate cause of their injuries was the negligence of the plaintiff Miller in driving the car in which they were riding into collision wth the truck.

This is pointed out very lucidly in the case of *Roanoke Ry. & Elec. Co.* v. *Whitner,* 193 Va. 253. In that case the plaintiff was riding as a guest in a Packard coupe owned and driven by one Chapman. The coupe ran into the back end of a bus owned and operated by the defendant while it was stopped on the paved highway in violation of a statute of the State of Virginia. The pavement was a marked 3-lane highway. The Court in reversing a judgment for the plaintiff and entering judgment for the defendant, say at page 260:

> "The primary negligence of the defendant was broken by the independent, efficient and wrongful intervening negligence of Chapman. The primary negligence of the defendant had ceased to operate. The intervening negligence of Chapman was responsible for all that thereafter occurred."

To the same effect see *Jaggers* v. *Southern Greyhound Line,* 34 Fed. Supp. 667 and 669; *Geisen* v. *Luce,* 185 Minn. 479 at 484.

It, therefore, follows that even if it could be held that the plaintiffs, Foster, Wagner, Shoffner and Browne, being passengers in the car driven by the plaintiff Miller, were not guilty of any negligence which contributed to cause their injuries, the verdicts in their favor were contrary to law, since the proximate cause of their injuries was the negligence of the plaintiff Miller, and not any negligence on the part of the defendant. The Court was, therefore, in error in affirming the judgments of the trial Court.

IV.

The plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints.

The charges laid in the plaintiffs' complaints are identical and will be found in paragraph 9 thereof (Tr. 4, 25 and 42). There are eight separate charges of negligence set up in separate paragraphs; five of these charges allege violation of certain sections of the Motor Vehicle Act. Three of these five charge violation of sections of the Motor Vehicle Act which have no application within the corporate limits of cities, villages and incorporated towns.

We would call the court's attention here, also, to the fact that it is alleged in paragraph 3 of the complaints that the accident in question occurred at a point on Skokie Highway approximately one-half mile north of where Skokie Highway is intersected by Willow Road, and in paragraph 4 that such point is outside the limits of any city, village or incorporated town. We would call

the court's attention, also, to the fact that the plaintiffs' proof shows that the occurrence took place about a mile and three-eighths north of the intersection of Skokie Highway and Willow Road and within the corporate limits of the Village of Glencoe. These facts will also be considered under Point V of the defendant's argument.

We wish to point out here that the plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints. Not only is this true, but, on the other hand, the plaintiffs' evidence tends to disprove most of these charges.

In the thirteenth paragraph of its opinion the Circuit Court of Appeals, in considering the charges laid in the complaints, say:

> "Furthermore, the complaints contained numerous charges of general negligence."

It is respectfully submitted that the court is in error in this statement. An examination of the charges laid in these complaints will show that the remaining three charges are charges of specific negligence.

We shall proceed to consider separately the charges laid in these complaints.

1. As to the charges laid in sub-paragraph 9 (a).

In this sub-paragraph it is charged that the defendant:

> "Carelessly and negligently stopped and parked said motor truck at a place where it was known, or by the exercise of reasonable care could or should have been known, it was dangerous to other northbound vehicles on said highway, in that it was known or could or should have been known that the red truck so blended into the red glow of the landscape and was so obscured by smoke, and fumes and gases as not to be discernible by persons traveling in a northerly direction until it was too late to prevent a collision."

The plaintiffs produced no evidence which tends to prove the charges laid in this paragraph. Their evidence goes no further than proof that the truck in question was red. There is no proof that it blended into the "red glow of the landscape" or that it "was so obscured by smoke and fumes and gases as not to be discernible." It cannot be inferred from the fact that the truck was red that it blended with the lights produced by the fusees. There was no proof that it was the same shade of red as was the light. The occurrence took place at night and the logical inference, if not the only inference, to be drawn from the proof is that the truck in question was much more clearly visible by reason of the light from the fusees than it would have been had there been no such light. At least such inference should be indulged until proof to the contrary appears. There was no such proof. The burden of producing such proof was on the plaintiffs.

Furthermore, there was no proof that the truck was so obscured by smoke and fumes and gases as not to be discernible. The plaintiffs' proof was to the effect that they had passed through the supposed smoke some distance before their car came into contact with the truck. Their proof fails to show that there was any smoke around the truck.

Nor did the plaintiffs prove that there was any smoke on the highway at the time the defendant's truck came to a stop. Their proof was that the smoke from the west side of the highway was blown over onto the east side into the lane in which they were traveling. So far as their proof goes, if such was the fact, it was most likely blown over after the defendant's truck had stopped, a circumstance over which the defendant had no control, and which their evidence does not show the defendant should have anticipated.

The proof also shows, as we have pointed out above, that the fusees from which this supposed smoke came were strung along the west side of the highway for a distance of at least 200 feet. According to the plaintiffs' proof this was as obvious to them as it could have been to the defendant. In fact, the proof shows that the plaintiffs were the only witnesses by whom the supposed smoke was observable at all, and they were in wide disagreement as to its density and the extent their vision was obscured by it. If the vision of anyone was obscured by the smoke, it was the vision of the plaintiffs, and that before they drove into it. They were in a position to see it. Yet, observing its presence, they negligently proceeded to drive through it without any regard to the fact that they were unable to see whether the highway ahead was clear.

Nor did they produce any proof that the defendant knew, or in the exercise of ordinary care should have known, that the lighting of a few fusees along the opposite side of the road would produce sufficient smoke or fumes or gases to obscure a vehicle standing on the highway. If such type of fusee was, in fact, used, the fusees were not lighted by the defendant, and the negligence in using such type of fusee and in producing the smoke, if they did, was that of the drivers on the west side of the road and not of the defendant. Neither the producing of the smoke, nor it blowing over onto the east side of the road was within the control of the defendant or to be anticipated by it.

We submit that the plaintiffs failed to produce any evidence tending to prove the charges laid in sub-paragraph (a) of paragraph 9 of the plaintiffs' complaints.

2. As to the charges laid in sub-paragraph 9 (b).

In this sub-paragraph the plaintiffs charge that the defendant:

> "Carelessly and negligently stopped and parked said motor truck under the circumstances as herein set forth, without having any tail light or other illumination burning upon the rear of said motor truck and without in any way indicating its presence on said highway and without giving warning to any person approaching the same, of its presence thereof."

The plaintiffs' evidence, we submit, disproves the charges laid in this sub-paragraph. Their proof shows that at the time the defendant's truck stopped on the highway the lights on the truck were burning (Tr. 80, 88). Such being the case, there was no duty on the part of the defendant to give any further warning than was given by the lights on the truck. *Miller* v. *Erickson,* 76 Fed. (2d) 598 at 599.

But the plaintiffs' evidence shows that a further warning was given. The plaintiff Foster testified that he saw a light on the right-hand side of the pavement ahead of them flashing from left to right (Tr. 205) 60 to 75 feet ahead (Tr. 207) and that he called Miller's attention to it (Tr. 237). The plaintiffs' proof, therefore, disproves the charges laid in this sub-paragraph.

3. As to the charges laid in sub-paragraph 9 (c).

In this sub-paragraph it is charged that the defendant:

> "Carelessly and negligently failed to have said truck equipped with and to keep in operation at said time and place, three red lights on the rear of said truck, plainly visible at a distance of at least 500 feet in violation of Section 104 of the Uniform Act regulating traffic on highways."

This section of the statute (Ill. Rev. Stat. 1941, Chap. 95½, par. 201) provides as follows:

> "(a) Every motor vehicle of the second division as described in Article I of this act, the length of which, together with any trailer or trailers in tow thereof, is more than 25 feet and the width of which is more than 80 inches, while being operated on the highways of this state outside the limits of cities, villages and incorporated towns, during the period from sunset to sunrise, shall display on the front thereof a horizontal line near the top of the vehicle, approximately 6 inches apart, three green lights plainly visible at a distance of at least 500 feet; also on the rear thereon in a horizontal line approximately 6 inches apart, three red lights plainly visible at a distance of at least 500 feet; also on the front of the body of said vehicle near the lower left hand corner one yellow or amber tinted reflector; also on the rear of the body of said vehicle, not more than 12 inches from the lower left hand corner, one red reflector. All motor vehicles of the second division more than 20 feet long and all trailers and semi-trailers, while being operated on the highways of this state outside the limits of cities, villages and incorporated towns, during the period from sunset to sunrise, shall display on each side of the vehicle at approximately the one-third point of the length of the same, at a height not exceeding five feet above the surface of the road, and reflecting on five feet above the surface of the road, and reflecting on a line approximately at right angles to the center line of the vehicle two amber tinted reflectors of a type approved by the Secretary of State. Providing, however, that on motor vehicles equipped with acetylene headlights, approved reflectors, conforming as to color and location, may be used in lieu of the three green lights and three red lights required under this section."

It will be noted that this section of the statute applies only when such vehicle is traveling on the highway

"outside the limits of cities, villages and incorporated towns."

The plaintiffs, however, failed to produce any evidence tending to prove that the defendant violated this statute in any respect. Such proof as the plaintiffs produced tends to disprove any such violation. Their evidence shows that the lights were burning on the defendant's truck (Tr. 80, 88), and that after the occurrence in question the truck with which the plaintiffs' car collided was equipped with such lights (Tr. 122). They produced no evidence that these lights did not comply with the requirements of the statute, either as to number or distance at which they were visible. Their own testimony was limited to the mere fact that before collision they did not see them.

4. As to the charges laid in sub-paragraph 9 (d).

In this sub-paragraph the plaintiffs charge that the defendant:

> "Carelessly and negligently failed to have said truck equipped with and to keep in operation at said time and place at least one lighted lamp so as to throw a red light visible for at least 500 feet in the reverse direction, in violation of Section 103 of the Uniform Act regulating traffic on highways."

This section of the statute (Ill. Rev. Stat., 1941, Chap. 95½, par. 200) is the familiar "tail light" statute. What we have pointed out above with reference to lights is applicable here. The plaintiffs proved that the defendant's truck was equipped with such taillight and that it worked (Tr. 122). They produced no proof that it was not working at the time of the occurrence. They did prove that the lights were burning on the defendant's truck As was said before, their own testimony was limited to the fact that they did not see it.

5. As to the charges laid in sub-paragraph 9 (e).

In this sub-paragraph the plaintiffs charge that the defendant:

> "Carelessly and negligently failed to provide or maintain a lookout for other northbound traffic lawfully and properly upon the highway."

The plaintiffs' proof shows that the defendant's trucks had stopped some little time before the car in which they were riding arrived at the scene of the occurrence. This is not, therefore, a case where the defendant made a sudden stop in front of traffic traveling closely in the rear. The occurrence was not caused by the stopping of the truck. It was, therefore, not caused by any failure on the part of the defendant to keep a "lookout" for other northbound traffic. If this charge was made on the assumption that it was the duty of the defendant to give to traffic approaching from the rear other warning in addition to the lights which were burning on the truck, such assumption is without foundation.

The highway where the trucks were stopped was straight and level for quite some distance in both directions. There was no hill or bend in the road to obscure their position. There was no necessity disclosed by the plaintiffs' proof of giving any additional warning. There was no negligence on the part of the defendant in failing, if it did fail, to give such warning.

In the case of *Miller* v. *Erickson,* 76 Fed. (2d) 598, the court considered this question. In that case the plaintiff was riding as a guest in an automobile driven by the defendant Erickson at a speed of at least 25 miles an hour in a snowstorm which limited the driver's visibility to 60 or 70 feet. The automobile in which he was riding collided with an automobile belonging to the defendant Wood, which was standing on the right-hand side of the

highway with its taillight burning. Wood's car was stuck and he was waiting for someone to give him a push in order to start his engine. It was contended that Wood should have had someone posted to the rear to warn approaching traffic. The court, in affirming a judgment for the plaintiff against Erickson, but reversing the judgment as to Wood, say, at page 599:

> "It seems to us extravagant to say that during the interval someone ought to have been sent back to flag approaching cars. Why should Wood have foreseen that Erickson would come along on such a night at such a speed? *Seibert* v. *Goldstein Co.*, 99 N. J. L. 200, 122 A. 821, cited as justifying such a result, does not do so. The recovery really rested upon the violation of a traffic law which required a tail light; and although the opinion does suggest that the driver should have sent back his assistant to give warning that was not necessary to the result. We think that a verdict should have been directed for the defendant Wood."

Although there was no duty on the part of the defendant to give any additional warning under the law as laid down in that case, the plaintiffs' proof shows that the defendant did take this additional precaution and that one of the plaintiffs, Foster, did see the flashlight ahead at a distance of 60 to 75 feet (Tr. 207), a distance which would have given the driver of their car, had he been observant, ample opportunity to turn to the left and avoid the collision, had the car, as the plaintiffs contend, been traveling at a speed of only 30 to 35 miles per hour. We respectfully submit that the plaintiffs failed to prove this charge and that their evidence disproves it.

6. As to the charges laid in sub-paragraphs 9 (f) and 9 (g).

These sub-paragraphs both charge a violation of the same section of the statute and will be considered to-

gether. By these sub-paragraphs the plaintiffs charge that the defendant:

> "(f) Carelessly and negligently stopped and parked said motor vehicle upon the paved or improved or main traveled part of said highway when it was then and there practical to stop, park or remove said vehicle off said part of the highway, in violation of section 88 of the Uniform Act regulating traffic on highways.
>
> "(g) Carelessly and negligently stopped and parked said motor vehicle upon the paved portion of said highway at the time and place aforesaid, without so parking the same that a clear view of such stopped vehicle would be available for a distance of 200 feet in each direction upon said highway, in violation of Section 88 of the Uniform Act regulating traffic on highways."

This section of the statute (Ill. Rev. Stat., 1941, Chap. 95½, par. 185) provides as follows:

> "(a) Upon any highway outside of a business, residence or suburban district, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available for a distance of 200 feet in each direction upon such highway."

It will be noted that this section of the statute applies only when such vehicle is "upon any highway outside a business, residence or suburban district."

In considering this statute the Circuit Court of Appeals say in the ninth paragraph of its opinion:

"There is some dispute as to whether section 88 is limited to highways outside of the incorporated limits of a city or village."

It is respectfully submitted that there could be no *bona fide* dispute about this. It is purely a question of law and the statute is clear. Section 16(b) of the same Act defines a "suburban district" as: "that portion of a city, village or incorporated town other than the closely built up business and residence district." It follows that Section 88 is limited to highways outside incorporated limits of a city or village.

The plaintiffs' proof, we submit, disproves the charges laid in both of these sub-paragraphs. As to the charges laid in sub-paragraph (f) the proof showed that the defendant's trucks were large, heavy trucks. Their proof showed also that a truck similar in size to that of the defendant's truck had pulled off the pavement on the left side of the highway and had sunk down to such an extent that it was unable to get back onto the highway. The occurrence took place the first part of April when the shoulder along the pavement can be expected to be soft. The proof showed that such was the case. It was, therefore, not "practical" to drive these vehicles off the paved highway, and there was, therefore, no violation of the statute in this respect.

The plaintiffs' proof, we submit, disproves any violation of this section of the statute by the defendant.

7. As to the charges laid in sub-paragraph 9 (h).

In this sub-paragraph the plaintiffs charge that the defendant:

"Carelessly and negligently stopped and parked the said motor vehicle on the paved portion of said highway without displaying any flares or lanterns or other signals visible at 100 feet to the rear of

said motor truck contrary to the provisions of Section 121 of the Uniform Act regulating traffic of the State of Illinois."

This section of the statute (Ill. Rev. Stat., 1941, Chap. 95½, par. 218) provides as follows:

"(a) No person shall operate any motor vehicle of the second division upon a highway outside of a business or residence district at any time from sunset to sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than 3, or electric lanterns or other signals capable of continuously producing three warning lights, each visible from a distance of at least 500 feet for a period of at least 12 hours, except that a motor vehicle transporting flammable liquid may carry red reflectors having a minimum diameter of 6 inches in place of the other signals above mentioned.

(b) Whenever any motor vehicle of the second division and its lighting equipment are disabled during the period when lighted lamps must be displayed on vehicles and such motor vehicle cannot immediately be removed from the main traveled portion of a highway outside of a business or residence district, the driver or other persons in charge of such vehicle shall cause such flares, lanterns or other signals to be lighted and placed upon the highway, one at a distance of approximately 100 feet in advance of such vehicle, one at a distance of approximately 100 feet to the rear of the vehicle, and the third upon the roadway side of the vehicle, except that if the vehicle is transporting flammables three reflectors may be so placed in lieu of such other signals and no open burning flares shall be placed adjacent to such last mentioned vehicle."

There is an additional paragraph of this statute which applies to transporting explosives, but there was no proof that the defendant was transporting such.

The Circuit Court of Appeals seems to lay great stress on the applicability of this section of the statute to the

plaintiffs' evidence in the ninth and thirteenth paragraphs of its opinion. It is respectfully submitted that the Circuit Court of Appeals was in error in this regard and that the plaintiffs failed to produce any proof whatsoever of any violation of this section of the statute on the part of the defendant.

It will be noted that paragraph (b) of this statute merely requires that a person operating such a motor vehicle is required to carry therewith a certain number of flares, lanterns or other signal devices. The plaintiffs produced no proof that the defendant's trucks were not equipped with such. Even if they had not been so equipped, such failure on the part of the defendant could not have been the proximate cause of the occurrence complained of.

It will also be noted that paragraph (b) applies only when a motor vehicle of the second division *"and its lighting equipment are disabled."* There was no proof nor even the slightest contention that the defendant's truck or its lighting equipment was disabled at the time of the occurrence. Consequently, there was no violation of this statute and no duty on the part of the defendant to display any flares or lanterns or other signals, as required by this sub-paragraph of the statute. The plaintiffs' proof showed conclusively that this section of the statute and the alleged violation thereof were not involved at all in the occurrence complained of.

The court was apparently confused as to the applicability of this section of the statute and had in mind Section 41(d) of the old Motor Vehicle Act of Illinois (Ill. Rev. Stats., 1935, Chap. 95-a, par. 42(4)). That statute required a commercial motor vehicle stopping upon any traveled portion of a highway outside the territorial limits of a city, village or town, upon certain conditions, to immediately give warning thereof by displaying and burning a railroad fusee type of flare or

other portable light in the immediate vicinity of such stopped vehicle, etc. This section of the old Motor Vehicle Act, however, was repealed by the passage of the Uniform Act Regulating Traffic upon the Highways in 1935 (Ill. Rev. Stats., 1941, Chap. 95½, par. 98, *et seq.*), and is no longer the law. Under the Uniform Act the lighting of trucks upon the highway is now prescribed by the statute, furnishes a sufficient warning to other vehicles upon the highway and the displaying of flares or other lights is no longer required, except in case a vehicle *and its lighting system* should become disabled, as provided in Section 121 of the Act. The effect of the repeal of Section 41(d) of the old Motor Vehicle Act is discussed in the case of *Cooney* v. *F. Landon Cartage Co.*, 308 Ill. App. 444, to which the court has already been referred. It is respectfully submitted that Section 121 of the Uniform Act Regulating Traffic on the Highways has no application to the plaintiffs' proof and that the plaintiffs failed to prove any violation of this section of the statute.

It is elementary that if the plaintiff is entitled to recover at all, he must recover on the proof of the charges laid in his complaint. Proof of acts of negligence, if any, other than those charged in the complaint, do not permit a recovery. In the case at bar the plaintiffs not only failed to prove any of the charges laid in their complaints, but as to the greater number of these charges the plaintiffs' evidence disproves them. The trial court was in error in denying the defendant's motion for directed verdicts and its further motion for judgment notwithstanding the verdicts. It was, therefore, error on the part of the Circuit Court of Appeals to affirm the judgment of the trial court.

V.

The Circuit Court of Appeals was in error in holding that there was no variance between the allegations of the plaintiffs' complaints and their proof.

It was alleged in the plaintiffs' complaints that the occurrence complained of happened at a point on Skokie Highway approximately one-half mile north of where Skokie Highway is intersected by Willow Road, and in paragraph 4 of the complaints that this point on the highway is outside the limits of any city, village or incorporated town (Tr. 3, 24, 42). The allegation of the complaints that the accident happened outside the limits of any city, village or incorporated town is a material allegation in that sections 104 and 88 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1941, pars. 201 and 185) have no application unless such was the fact. The proof shows that the place of the occurrence complained of was not approximately one-half mile north of Willow Road, but at a point about one and three-eighths miles north thereof, north of Tower Road and opposite the water tower (Tr. 71, 81, 103, 115, 126, 221-223) and within the corporate limits of the Village of Glencoe (Tr. 309).

When it appeared from the proof that the accident did not happen outside the limits of a city, village or incorporated town, as alleged, but did, in fact, occur within the corporate limits of the Village of Glencoe, the defendant called the court's attention to this fact and moved for leave to file an amendment to its answer, setting up such fact in order to conform to the proof (Tr. 371-373). Upon objection of counsel, the court overruled the defendant's motion and refused to permit it to file its amendment (Tr. 373). Although there was no dispute in the evidence that the occurrence took place

within the corporate limits of the Village of Glencoe, counsel for the plaintiffs refused to amend the complaints to state the truth, or to dismiss the charges, laid therein, predicated on these alleged violation of these statutes. The defendant moved the court for directed verdicts on the ground of this variance (Tr. 460), but the motion was overruled (Tr. 463). The complaints were never amended to speak the truth.

The trial court was in error in refusing to permit the defendant to amend its answers. Civil Practice Act, Illinois, Sec. 46 (3), Ill. Rev. Stat., 1941, Chap. 110, par. 170; and Rules of Civil Procedure for the District Court, Rule 15. But the error of the trial court did not cure the variance between the allegations of the complaints and the plaintiffs' proof.

In considering this variance, the Circuit Court of Appeals in the tenth paragraph of its opinion say:

> "When defendant admitted by its pleadings that the collision occurred outside of the incorporated limits of Glencoe, there was no burden upon the plaintiffs to make such proof, and, as stated, there is nothing in the record which would justify a contrary holding."

It is respectfully submitted that the Circuit Court of Appeals is in error in this statement. While it may be true that a fact admitted by the pleadings is not required to be proved, that is not the situation here. Having alleged a state of facts, which, if proven, would have made out a cause of action, they proved that such state of facts were untrue,—that they had no cause of action under these charges of their complaints. Recovery cannot be had upon proof of a state of facts under which no liability exists.

In considering the map in evidence (Tr. 309), the Circuit Court of Appeals say, also, in the tenth paragraph of its opinion:

> "It is true this map is in evidence, but it is also true that the court instructed the jury, at plaintiffs' request, to disregard any reference on the map to the Village of Glencoe and any designation as to incorporated and unincorporated territory. This motion was allowed for the reason that the court considered the map unreliable."

It is true that the trial court did instruct the jury to disregard the references on the map to the Village of Glencoe, but it is respectfully submitted that the Circuit Court of Appeals is in error in stating that the motion was allowed for the reason that the court considered the map unreliable. The record shows (Tr. 320) that the motion of counsel for the plaintiffs to strike the map on the grounds that it was unreliable was overruled and that the court instructed the jury to disregard any references on the map to the Village of Glencoe for the reason stated by counsel for the plaintiffs (Tr. 308) that "it is in direct violation of the pleadings introduced by the defendant in this case as to the question of incorporation of the territory involved." But instructing the jury to disregard the map for these reasons did not cure the variance between the plaintiffs' proof and the allegations of their complaints. They did not stand on the allegations of their complaints, but, on the contrary, proved the allegations to be untrue, that the occurrence did not take place outside the limits of an incorporated village, or at the place alleged in their complaints.

The law is well settled that a plaintiff cannot recover on an alleged state of facts where there is a material variance between the proof adduced and the facts alleged.

In the case of *Brodsky* v. *Frank,* 342 Ill. 110, the court say at page 116:

> "At the close of the evidence these variances were called to the attention of the court and a motion was

made to direct a verdict, which motion was overruled. A plaintiff must prove the case alleged in his declaration. He can recover only on the allegations of the declaration and not on a case not alleged, even though such a case is established by the evidence. A defendant has a right to know what the charges are in order to properly make a defense and to prevent his being taken by surprise by evidence on the trial. (*Feder* v. *Midland Casualty Co.*, 316 Ill. 552.) The question of a variance was properly raised in the trial court and the motion to direct a verdict should have been sustained."

In the case of *Buckley* v. *Mandel Bros.*, 333 Ill. 368 it was alleged in the plaintiff's complaint that the defendant's truck struck the plaintiff. The proof showed that the plaintiff, who was riding a motorcycle, ran into and struck the truck. The court, in reversing a judgment for the plaintiff without remandment, say at page 373:

"When the plaintiff sets out in his declaration the negligent acts of the defendant relied on as a basis for a recovery, he must establish those negligent acts, and cannot recover by reason of negligent acts of the defendant not averred in the declaration as a ground of recovery, even though the acts proven show the defendant was guilty of negligence which caused the injuries. (Citing cases.) When the variance between the declaration and proof is insisted on at the trial, so that the plaintiff has the opportunity to amend his declaration, it is error for the trial court to refuse to direct a verdict if he fails or refuses to amend the declaration. (Citing cases.)"

Under the charges laid in sub-paragraphs (c), (f), and (g) of paragraph 9 of the plaintiffs' complaints there could be no violation of the statutes referred to therein, unless the occurrence took place outside the corporate limits of a city, village or incorporated town. The plaintiffs allege that it so took place. The proof is con-

clusive that it did not. There was, therefore, a fatal variance between the proof and the allegations of the complaints.

CONCLUSION.

In conclusion, your petitioner respectfully submits that in the several respects hereinbefore pointed out the trial court and the Circuit Court of Appeals were in error, and that their judgments should be reversed.

Your petitioner, therefore, prays that this Honorable Court may grant its petition for writ of certiorari in the said cause, to the end that the said cause may be reviewed and determined by this Court, as provided by statute, and that the judgments of the said Circuit Court of Appeals and of the District Court of the United States for the Northern District of Illinois, Eastern Division, may be reversed by this Court.

Respectfully submitted,

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